Supreme Court, U.S.
FILED

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No. ——

# In the Supreme Court of the United States

APPLIED COMPANIES, INC.,
*Petitioner*,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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119 pp

## QUESTION PRESENTED

For breach of contract by the United States, is the measure of damages governed by the law of contracts between private parties?

## PARTIES TO THE PROCEEDING
(and Corporate Disclosure Statement)

Petitioner

Applied Companies is a California corporation, which has not issued shares to the public. No publicly held corporation owns any of Applied Companies' stock.

Respondent

Respondent is the United States of America acting by and through the Department of Defense, Donald H. Rumsfeld, Secretary.

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## BASIS FOR JURISDICTION

The judgment and original opinion of the United States Court of Appeals for the Federal Circuit were entered and issued on December 10, 2002. Applied Companies filed a timely petition for rehearing on January 17, 2003, within the 45 days allowed by FRAP 40(a)(1). The Federal Circuit's order granting petition for rehearing "for the limited purpose of correcting factual misstatements in the court's decision issued on December 10, 2002," withdrawing that decision, and otherwise denying the petition, together with the Federal Circuit's substituted decision, was issued on April 2, 2003. This petition for writ of certiorari is filed within 90 days of that order and amended decision of the Federal Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

## REGULATION INVOLVED

Federal Acquisition Regulation (FAR) 48 C.F.R. (1993 Ed.) § 16.503 (a)(i):

> **"16.503 Requirements contracts.**
>
> (a) *Description.* A requirements contract provides for filling all actual purchase requirements of designated Government activities for specific supplies or services during a specified contract period, with deliveries to be scheduled by placing orders with the contractor.
>
> (1) For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available."

## STATEMENT OF THE CASE

Applied Companies and the United States entered into a contract for the sale of goods. The contract was a requirements contract under which the government agreed to buy all of its requirements for certain compressed gas storage cylinders for a one-year period. The government's request for proposals (RFP) included the government's estimate that it would require 119, 495 cylinders ("plus 03% minus 03%").

That estimate was included in the contract as awarded to Applied.

The government's estimate of its requirements was negligently prepared. Before accepting Applied's bid and forming the contract, the government's contracting officer became aware that the estimate was considerably overstated. The government's true requirements were for 3,592 cylinders.

Before any cylinders were delivered, the government terminated the contract for convenience of the government.

Applied made claim against the United States for damages in the amount of its expectation interest. Restatement of Contracts 2d § 347. Applied claimed the amount of profit that it would have made if the government's estimate of its requirements had been a true, realistic estimate.

In Applied Companies, ASBCA Nos. 50,749, 50,896, 51,662, 01-1 BCA ¶ 31,325, reconsideration denied, 01-2 BCA ¶ 31,430, the Armed Services Board of Contract Appeals (ASBCA), ruling on the issue of entitlement (liability) only, held that the government's negligent estimates constituted a breach of contract, that Applied was entitled to recover damages, and that those damages could include anticipatory profits.

On the government's appeal, the full panel of the Federal Circuit affirmed the ASBCA's decision that the government had breached the contract and was liable for damages.

A majority of the Federal Circuit panel went on to provide "guidance regarding the proper measure of Applied's recovery." The published decision states that the contractor

may not recover anticipatory profits. The majority held that the contractor's damages were limited to an "equitable adjustment" in the price of cylinders it delivered and that, since Applied delivered no cylinders, it recovers nothing as damages. One judge of the Federal Circuit dissented from the majority's "guidance" on the measure of damages. The dissent, citing the decisions of this Court in United States v. Winstar Corp., infra and Lynch v. United States, infra, argued that the court should apply "ordinary principles of contract construction and breach." Citing, inter alia, Restatement of Contracts 2d § 347, the dissent asserted that "the rule in this area is that lost profits are available to the non-breaching party."

The Federal Circuit's (majority) decision is that the measure of damages for breach of contracts between private parties, Restatement of Contracts 2d § 347 and Uniform Commercial Code § 2-708(2), is not available to this seller of goods to the government.

The divided opinions below present the issue whether, for a breach of contract by the United States, the measure of damages is that provided by the established law of contracts between private parties, or is a new measure, unknown in that law and unique to contracts of the government and to the Federal Circuit.

## BASIS FOR FEDERAL JURISDICTION

The Armed Services Board of Contract Appeals had jurisdiction pursuant to the Contract Disputes Act of 1978, 41 U.S.C. § 607(d).

The Federal Circuit held that it had jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) (but see note 1, infra).

## ARGUMENT FOR GRANTING THE WRIT

### I. THE MAJORITY DECISION OF THE FEDERAL CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT BY DEPARTING FROM ESTABLISHED CONTRACT LAW.

It is a fundamental principle, often restated by the Supreme Court, that contracts of the United States are subject to the same law that governs the contracts of private parties. United States v. National Exchange Bank of Baltimore, Md., 270 U.S. 527, 534, 46 S.Ct. 388, 389, 70 L.Ed. 717 (1926) ("The United States does business on business terms"); Lynch v. United States, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); Perry v. United States, 294 U.S. 330, 352, 55 S.Ct. 432, 435, 79 L.Ed. 912 (1935); United States v. Winstar Corp., 518 U.S. 839, 895, 116 S.Ct. 2432, 2464-65, 135 L.Ed.2d 964 (1996); Mobil Oil Exploration and Producing, Southeast, Inc. v. United States, 530 U.S. 604, 607, 120 S.Ct. 2423, 2429, 147 L.Ed.2d 528 (2000). That principle is at stake in the case. The Federal Circuit majority's decision is that the government breached this contract but is not liable for the measure of damages provided by established contract law.

The ASBCA and the full panel of the Federal Circuit both unanimously held that the government breached its contract with Applied. The breach was inclusion in the RFP and the contract of a statement that was not true: the statement that 119,495 (±03%)was the government's estimate of its requirements. The Federal Acquisition Regulations (FAR), 48 CFR § 16.503 required that estimate "for the information of offerors and contractors" and required the estimate to be "realistic." But the government's estimate in this case was negligently prepared. After Applied had submitted its bid in

reliance on the government's estimate, but before award was made, the government established that its actual needs were only 3,592 cylinders. Appendix pp. 6a and 81a. The government did not inform the bidders of that new number. Instead, it made award based on Applied's original bid. The contract as awarded contained the government's estimate that its requirement was 119,495 (±03%). Appendix p. 6a.

The unanimous holdings that the government breached the contract and that Applied was entitled to damages followed established law. Womack v. United States, 389 F.2d 793 (Ct.Cl. 1968); Medart, Inc. v. Austin, 967 F.2d 579 (Fed.Cir. 1992).

The difference between the ASBCA and the Federal Circuit majority was in the measure of damages.[1] The ASBCA's decision stated that "breach damages may include anticipatory profits," citing Carchia v. United States, 485 F.2d 622, 625 (Ct.Cl. 1973) (which, in turn, cites two cases that refer to anticipatory profits as "common-law damages," General Builders Supply Co. v. United States, 409 F.2d 246, 251 (Ct.Cl. 1969) and J.D. Hedin Const. Co. v. United

[1] The ASBCA did not determine an amount of damages, but only granted Applied's motion for summary judgment that it was entitled to recover anticipatory profits. The ASBCA stated that it was not considering quantum and its decision contemplated a future "quantum phase." Appendix pp. 92a-93a. Because there was no final judgment of the ASBCA for a liquidated sum, Applied moved to dismiss the government's appeal to the Federal Circuit on grounds that there was no "final decision of an agency board of contract appeals" within 28 U.S.C. § 1295(a)(10). The Federal Circuit denied the motion and held that the ASBCA's entitlement decision was a final decision because the contracting officer's decision, which Applied had appealed to the Board, "decided only entitlement." 325 F.3d at 1333, n.3, Appendix pp.10a-11a.

States, 408 F.2d 424, 431-432 (Ct.Cl. 1969)). 01-1 BCA p.154,734, Appendix p. 92a.

The majority decision of the Federal Circuit is that for a breach of contract of the "kind" that occurred in this case, the common-law damages of anticipatory profits are not recoverable. The decision states that "We think the approach of an equitable adjustment [in the price of delivered goods] properly assesses Applied's damages." 318 F.3d 1329-1330, Appendix p. 65a. After the Federal Circuit was advised, on request for rehearing,[2] that no goods were delivered before the government terminated the contract for its convenience, the majority acknowledged that the effect of its decision was that the contractor could recover no compensation for the government's breach. 325 F.3d at 1342, Appendix p. 29a.

Dissenting Federal Circuit Judge Dyk noted that the majority's decision "leaves the contractor completely uncompensated for the breach." 325 F.3d at 1342, Appendix p. 30a. The dissent cited this Court's decisions in United States v. Winstar Corp., supra, and Lynch v. United States, supra, for the proposition that the applicable principles were the "ordinary principles of contract construction and breach" and cited the Restatement of Contracts for the principle that lost profits are available to the non-breaching party. 325 F.2d at 1343-1344, Appendix pp. 33a-34a.

[2] The Federal Circuit majority's decision that the measure of damages should be an "equitable adjustment" was devised on the assumption, without a factual finding by the ASBCA, that before the contract was terminated goods were delivered, the prices of which could be "adjusted." Applied's petition for rehearing pointed out the error in the majority's assumption. See Appendix p. 3a.

The "equitable adjustment" remedy invoked by the Federal Circuit majority is not a measure of damages available in the common law of contracts. Cf. Restatement of Contracts 2d §§ 344 and 347. Rather, "equitable adjustment" is a term of art used in certain clauses of contracts of the United States, most particularly, the standard-form "Changes" clause, FAR § 52.243-1. See generally, Nash, Government Contract Changes (2nd Ed. 1989) Ch. 16. "Equitable adjustment" is not a measure of damages at all. It is a means "to keep a contractor whole when the government modifies a contract." Ibid, p. 16-2 (quoting Bruce Const. Co. v. United States, 324 F.2d 516 (Ct.Cl. 1963)). A treatise has said that "an equitable adjustment should not allow a contractor to reprice a contract that threatens to yield a loss nor should it allow the Government to take an extra high profit away from a contractor." Ibid, p.16-3. An equitable adjustment is not a remedy for a change in contract quantities (e.g. from 119,465 to 3,592) because the "Changes" clause does not provide for changes in quantities. FAR § 52.243-1 and Nash, Government Contract Changes, supra p.4-7.[3]

If the government's contracts are governed by the same law that governs private parties, then the majority decision of the Federal Circuit is error. The law of contracts between private parties provides three measures of damages: the benefit of the bargain (anticipatory profits), reliance damages (costs), and restitution. Restatement of Contracts 2d §§

[3] In the case relied on by the Federal Circuit majority to "suggest" the equitable adjustment remedy, Everett Plywood and Door Corp. v. United States, 419 F.2d 425 (Ct.Cl. 1969), the claimant contractor was not a seller, but was a buyer of goods from the government (timber) and the contract provided for quantity variations by providing established unit prices that decreased as quantities increased. See also Dissent at Appendix p. 31a-32a.

344§§, 347, 349 and 371. Of those, the general measure is the benefit of the bargain and the others are fall-backs for injured parties who cannot prove anticipatory profits with requisite certainty or who have conferred a benefit on the other party. Ibid, § 347, § 349 at Comment a., and § 370. To like effect is UCC § 2-708(2) (measure of seller's damages "is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer"). But the majority of the Federal Circuit holds that a contractor who is the victim of the "kind" of breach that occurred in this case is not entitled to any measure of damages provided by the Restatement of Contracts but only to an "equitable adjustment." That is wholly new law that departs from the law that governs contracts of private parties. It is law that exists only in the Federal Circuit.

A writ of certiorari should issue to correct the Federal Circuit majority's rejection of established contract law and prevent the generation of inconsistent contract law unique to the Federal Circuit. The writ should issue to correct the Federal Circuit's conscious avoidance of the law so clearly (and often) enunciated by this Court; if the writ does not issue it will no longer be true that contracts of the United States are governed by the same contract law that governs private parties.

## II. THE MAJORITY DECISION OF THE FEDERAL CIRCUIT DEPRIVES THE CONTRACTOR OF ANY COMPENSATION FOR A MATERIAL BREACH.

As correctly perceived by the dissent, the Federal Circuit's majority decision "leaves the contractor completely uncompensated for the breach." 325 F.3d at 1342, Appendix p. 30a. Having been lured into a contract containing representations which the government knew to be inaccurate,

the contractor finds himself unable to enforce the contract and without any remedy for a material breach. That result is so unjust on its face that it must be error.

The Federal Circuit majority's error began with its identification of the breach:

> "The government's breach in this case was the inclusion of negligently prepared estimates in the RFP." 325 F.3d at 1339, Appendix p. 24a.

Not so. A Request for Proposals is a solicitation of offers intended to lead to a contract; it is not a contract. FAR § 15.402. An assertion that is not in accord with the facts and that is made prior to contract formation (e.g. in a solicitation) but not included in the contract, is not a breach. Such an assertion is a misrepresentation. Restatement of Contracts 2d § 159. If it is material, a misrepresentation makes the contract voidable. Ibid § 376. A misrepresentation may also be a tort. Restatement of Torts 2d § 552 and 552B.[4]

But this government representation of its estimate was not just in the RFP; it also appeared in the contract. A representation of one party that is included in the contract is no longer just an inducement to contract; it has become a term of the contract and in contract law it is a warranty. Uniform Commercial Code § 2-313(1)(a); Clearwater Forest Industries, Inc. v. United States, 650 F.2d 233, 238 (Ct.Cl. 1981) ("'In essence, a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely ... a warranty amounts to a promise to

[4] And where, as here, the misrepresentation is knowingly made, it is fraudulent (Restatement Torts 2d § 526(a)) and tort law gives the victim, in a business transaction, "additional damages sufficient to give him the benefit of his contract with the maker." Id. § 549(2).

indemnify the promissee for any loss if the fact warranted proves untrue.'"). Once a representation is included in the contract and becomes a warranty, the consequences that ensue from falsity are different from those that can follow an extra-contractual misrepresentation.

> "...[B]ecause relief for breach of warranty is generally based on the value that the property would have had if it had been as warranted (see Uniform Commercial Code § 2-714(2)), it is ordinarily more extensive than that afforded if [a buyer of goods] merely seeks to avoid the contract on the ground of mistake." Restatement of Contracts 2d § 152, Comment g.

In this case, the warranty was that the government's estimate was properly made and "realistic," as required by FAR § 16.503. See Dissent, Appendix p. 35a. The warranty was that the estimate was a reasonable expectation. It was error for the Federal Circuit to ignore the inclusion of the government's estimate in the contract and to treat it only as a representation in the inducement to contract (the RFP).

The Federal Circuit majority also reasoned that damages could not be based on the government's estimate because that would "convert" the contract into one that "guaranteed Applied of a certain level of business." 325 F.3d, p.1339, Appendix p. 24a. That logic confuses the issue of liability with the issue of amount of damages. Once there is liability for a material breach, it does not matter whether the breach was of a "guarantee" of a specific level of business or of a warranty.

> "If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach." Holmes, J. in Globe Refining Co. v. Landa

> Cotton Oil Co., 190 U.S. 540, 544, 23 S.Ct. 754, 47 L.Ed. 1171 (1903) as quoted in Farnsworth on Contracts (2nd Ed. 1998) § 12.8.

There can be no objection to using the government's estimate to quantify the contractor's damages. Lost profits are "necessarily an estimate." Humetrix Inc. v. Gemplus S.C.A., 268 F.3d 910, 919 (9th Cir. 2001). In this case, the quantity estimate to be used is that of the breaching party. A similar government quantity estimate was held to be a warranty and used to calculate the contractor's recovery in Everett Plywood and Door Corp. v. United States, 419 F.2d 425 (Ct.Cl. 1969).

The Federal Circuit majority further held that the contractor's damages could not be based on the government's negligent estimate because that estimate was the breach. The majority reasoned that the contractor could not show that it would have made a profit but for the breach (i.e. if the estimate had been different). 325 F.3d at 1340, Appendix pp. 24a-25a. The majority further reasoned that to award damages based on the negligent estimates would "allow Applied to benefit from [the government's] breach" because, but for the negligent estimate, Applied would have entered into a different contract or no contract at all. 325 F.3d at 1340, Appendix p. 25a.

The fallacy in the majority's reasoning is manifest: it can be said of every contract that contains a material misrepresentation that the contract would have been different or would not have come into being but for the misrepresentation. As noted by the dissent, the majority's reasoning treats the misrepresentation "as if it had never happened." 325 F.3d at 1345, Appendix p. 37a.

The government's estimate was included in the contract as made and the remedy of established contract law is to enforce that contract. The Anglo-American common law of contracts does not punish for a breach. Restatement of Contracts 2d § 355. Instead, it remedies by enforcement of the contract. Restatement of Contracts 2d Ch. 16 Topic 2 "Enforcement by Award of Damages" and Introductory Note. What is enforced is the bargain that was made: "Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract." Ibid § 344, Comment a. To deny enforcement of the contract as made because it wouldn't have been made but for the breaching party's misrepresentation would deny enforcement of every warranty and is error.

## CONCLUSION

The Federal Circuit majority opinion conflicts irreconcilably with relevant decisions of the Supreme Court on a matter of fundamental importance. Instead of holding the government subject to the same contract law that binds private parties, the majority excuses the government from enforcement of the terms of its contract and holds that the government is not liable to this contractor for the expectation that the government wrote into the contract. Instead of hewing to established law, the majority creates a new measure of damages, unknown in the law of private parties' contracts, that gives this victim of the government's breach no remedy at all.

Certiorari should issue to put a stop to the Federal Circuit's origination of unique contract law and to reaffirm the principle that "the United States does business on business terms."

Respectfully submitted,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**01-1630**

**[Decided April 2, 2003]**

Donald H. Rumsfeld, SECRETARY OF DEFENSE,
Appellant,

v.

APPLIED COMPANIES, INC.,
Appellee.

**JUDGES:**
Before SCHALL, DYK, and PROST, Circuit Judges. Opinion for the Court filed by Circuit Judge SCHALL. Opinion concurring-in-part and dissenting-in-part filed by Circuit Judge DYK.

## ORDER

Applied Companies, Inc. ("Applied") has petitioned for panel rehearing of the court's December 10, 2002 decision. *Rumsfeld v. Applied Companies, Inc.*, 318 F.3d 1317 (Fed.Cir.2002) ("*Applied*").

This suit arises out of a requirements contract between the Defense Logistics Agency ("DLA"), a component of the Department of Defense, and Applied. Under the contract, during the specified period, DLA was to purchase from Applied all of its requirements for two types of refrigerant storage cylinders. After DLA terminated the contract for the convenience of the government, Applied submitted termination settlement and breach of contract claims to the contracting officer. Among other things, Applied alleged that DLA had breached the contract by providing, in the request for proposals ("RFP") furnished to prospective bidders, faulty estimates of the number of cylinders it would require during the contract period and then failing to inform bidders when it determined the estimates were inaccurate. Following the contracting officer's denial of its claim for lost profits, Applied appealed to the Armed Services Board of Contract Appeals ("Board") under the provisions of the Contract Disputes Act, 41 U.S.C. §§ 601-613. *Id.* at 1319.

Ruling on cross-motions for summary judgment, the Board concluded that DLA had breached the contract by negligently failing to inform Applied that the estimates in the RFP were inaccurate. *In re Applied Cos., Inc.*, ASBCA Nos. 50,749, 50,896, and 51,662, 01-1 B.C.A. (CCH) ¶ 31,325 at 154,729, 2001 WL 210655 (Feb. 26, 2001). The Board also concluded that, during quantum proceedings, Applied could seek to recover the profits it had anticipated making on the total number of cylinders that DLA estimated in the RFP. *Id.* at 154,734. The Secretary of Defense ("government") appealed the Board's decision. In our December 10 decision, we affirmed the Board's ruling that DLA had breached its contract with Applied. *Applied*, 318 F.3d at 1323. However,

we also stated that, as a matter of law, Applied was not entitled to recover its anticipated profits. *Id.* at 1324.

In its petition for rehearing, Applied argues first that our decision contains a factual error. Specifically, Applied asserts that we incorrectly state that DLA purchased a total of approximately 11,500 cylinders under the contract. According to Applied, while DLA did order that number of cylinders, the contract was terminated before any deliveries were made. Applied's second point is that our conclusion that Applied is not entitled to recover its anticipated profits is incorrect as a matter of law. In its response to the petition, the government states that "[t]he record below does not reflect-- either way-- whether, in fact, Applied delivered any items pursuant to the contract." As far as Applied's second point is concerned, the government urges that our decision is free of legal error.

Having considered Applied's petition and the government's response, we conclude that, to the extent our decision states in definitive terms that there were deliveries under the contract, the decision is factually incorrect. Accordingly,

**IT IS ORDERED THAT:**

(1) The Petition for Rehearing is granted for the limited purpose of correcting factual misstatements in the court's decision issued on December 10, 2002. That decision is hereby withdrawn and the decision attached to this Order is substituted in its place.

(2) In all other respects, the Petition for Rehearing is denied.

## OPINION

SCHALL, Circuit Judge.

This suit arises from a requirements contract between the Defense Logistics Agency ("DLA"), a component of the Department of Defense, and Applied Companies, Inc. ("Applied"). Under the contract, among other things, DLA was to purchase from Applied all of its requirements for two types of refrigerant storage cylinders during the period from June of 1994 through June of 1995, with an option year. In its request for proposals ("RFP"), DLA estimated its annual requirements for the two types of cylinders at 62,945 and 56,550 units, respectively. Prior to contract award, DLA determined that the estimates in the RFP were greatly overstated. However, this information was not communicated to any of the offerors, including Applied. Applied was awarded the contract, but after ordering only approximately 10% of the estimated quantity of cylinders, DLA terminated the contract for convenience on February 6, 1995.

Following the denial of its termination for convenience settlement proposal and a claim for breach of contract, Applied appealed to the Armed Services Board of Contract Appeals ("Board") under the provisions of the Contract Disputes Act, 41 U.S.C. § § 601-613 ("CDA"). Ruling on cross-motions for summary judgment, the Board concluded that DLA had breached the requirements contract by negligently failing to inform Applied that the estimates of its

cylinder requirements in the RFP were inaccurate. Determination of the amount of damages was reserved for further proceedings. *Applied Cos., Inc.*, ASBCA Nos. 50,749, 50,896, and 51,662, 01-1 B.C.A. (CCH) P 31,325 (Feb. 26, 2001) ("*Applied I*"). DLA's subsequent motion for reconsideration was denied. *Applied Cos., Inc.*, ASBCA Nos. 50,749, 50,896, and 51,662, 01-2 B.C.A. (CCH) P 31,430 (May 21, 2001) ("*Applied II*"). The Secretary of Defense ("government") now appeals the Board's decision. Because the Board did not err in holding that DLA had breached its contract with Applied, we affirm.

## BACKGROUND

### I.

The pertinent facts, which are not in dispute, are set forth in *Applied I*. They are as follows:

The requirements contract stemmed from a procurement for cylinders to store R-12 and R-114 refrigerants, which are classified as "Class I Ozone Depleting Substances," or "ODSs." *Applied I*, 01-1 B.C.A. at 154,730. DLA, which was charged with building and maintaining a stockpile of ODSs for the Department of Defense, assessed the existing inventories of ODSs, the amount of ODSs likely to be used and recycled, and the amount of ODSs needed to ensure availability for mission critical uses. In June of 1993, based on its assessment, DLA developed estimates of the amount of R-12 and R-114 refrigerants that it needed to acquire and, by extension, the number of cylinders that would be required to store those refrigerants. *Id.* On July 14, 1993, DLA issued

the RFP for the requirements contract. DLA estimated in the RFP that 62,945 cylinders would be needed for the storage of R-12 refrigerants and that 56,550 cylinders would be needed for the storage of R-114 refrigerants, for a total of approximately 120,000 cylinders during the one year term of the contract.[1] *Id.* The RFP stated that the variation in actual quantity purchased would be "plus 03% minus 03%." The estimated quantities were the same for the option year. *Id.* On or about August 11, 1993, Applied, among others, responded to the RFP. Applied was the lowest responsive offeror.

In January of 1994, after initiating a pre-award survey, DLA determined that the reserve requirements for R-12 and R-114 refrigerants were considerably lower than previously believed. *Applied I* 01-1 B.C.A. (CCH) at 154,731. As a result, DLA established that the number of R-12 and R-114 storage cylinders that would be needed during the upcoming year were 2,555 and 1,037, respectively. *Id.*

On June 20, 1994, DLA awarded the requirements contract to Applied, accepting its bid of $52.60 per cylinder. *Id.* In the notice of award, DLA repeated the estimates contained in the RFP. Under the contract, for the period June 20, 1994, to June 14, 1995, DLA was obligated to "order from the contractor all the [cylinders] that are required to be purchased by the Government." The contract also provided that the "quantities of [cylinders] specified in the schedule are

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[1] The RFP and contract involved other sizes and models of cylinders that are not at issue in this dispute. In the interest of clarity, we hereafter refer to the two types of cylinders at issue as the "cylinders" covered by the contract.

estimates only and are not purchased by this contract." The contract incorporated various clauses from the Federal Acquisition Regulations ("FAR").

In August of 1994, DLA informed Applied--for the first time--that it had "discovered that a significant mistake was made in calculating the estimates. "*Id.* In place of the erroneous estimates contained in both the RFP and the contract, DLA provided new estimates of the minimum and maximum quantities of R-12 and R-114 refrigerant cylinders actually purchased that it would require. *Id.* DLA eventually ordered a total of approximately 11,950 units of R-12 and R-114 cylinders, approximately one-tenth of the total quantity originally estimated. *Id.*

DLA sought to modify the contract to reflect the new estimates. Applied responded by submitting a revised price of $126.98 per cylinder and requesting payment for $615,945 in "under absorbed indirect costs." *Id.* DLA replied by proposing to pay $79 per unit for the reduced quantity of cylinders. Applied did not accept this proposal, and on February 6, 1995, DLA terminated the contract for convenience. *Applied I*, 01-1 B.C.A. (CCH) at 154,732. It does not appear from the record before us that Applied delivered any cylinders to DLA.

Applied submitted a termination for convenience settlement proposal in the amount of $1,791,499.00, to compensate it for the shortfall in the cylinders ordered by DLA and for the overhead it allegedly absorbed in the course of preparing for and performing its obligations under the contract. *Id.* On February 26, 1997, by unilateral

determination, the termination contracting officer denied payment for under-absorbed overhead costs and unilaterally settled Applied's termination claim for $295,253.00. *Id.* This sum covered Applied's costs of terminating its work in progress and $31,718.00 for profit relating to work in progress. Since Applied already had received partial payments under the contract totaling $295,253.00, the termination contracting officer determined that Applied was not entitled to any payment by way of termination settlement. *Id.*

Applied subsequently submitted to the contracting officer a claim for breach of contract. Applied alleged that it had relied on DLA's faulty estimates in preparing and submitting its bid and had entered into agreements with subcontractors and suppliers accordingly. *Applied I*, 01-1 B.C.A. (CCH) at 154,733. Based on the estimates contained in the RFP and contract, Applied asserted, it had expected to generate a profit of $8.85 per cylinder on approximately 119,495 cylinders, for a total profit of $1,057,530.80. *Id.* According to Applied, DLA's negligence in the preparation of the estimates constituted a breach of contract that entitled Applied "to recover damages in the amount of its anticipated profit."

On June 12, 1998, the contracting officer issued a final decision denying Applied's breach claim. *Id.* Though the contracting officer concluded that DLA had failed to exercise due care in the preparation of its estimates, she viewed that negligence as giving rise to a constructive change, rather than a breach, of the contract between DLA and Applied. Accordingly, she ruled that, in terms of relief, Applied was limited to an equitable adjustment under the Changes Clause of the contract, see FAR 52.243-1(b), 48 C.F.R. § 52.243-

1(b), or to the recovery of the costs it had incurred plus a reasonable profit, as contemplated by the Termination for Convenience Clause, see FAR 52.249-2(f)(2), 48 C.F.R. § 52.249-2(f). The contracting officer stated that whatever costs Applied could have established under a theory of constructive change or partial termination for convenience would have been paid as part of the termination settlement.

## II.

Applied appealed the two contracting officers' decisions to the Board. Ruling on the parties' cross-motions for summary judgment, the Board addressed the question of whether DLA's negligent inclusion of inaccurate estimates in the RFP was a breach of its requirements contract with Applied. Noting the undisputed fact that "the Government knew it would actually need about one-tenth of the quantities in the solicitation," and relying on the decision of the Court of Claims in *Womack v. United States*, 182 Ct. Cl. 399, 389 F.2d 793 (Ct. Cl. 1968), the Board ruled that DLA's actions constituted a breach of the contract that entitled Applied to compensatory damages: "The Government was . . . negligent, and appellant is entitled to . . . damages for breach of the contract." *Applied I*, 01-1 B.C.A. at 154,734. The Board therefore granted Applied's motion for summary judgment. Finally, while it noted that its decision only addressed the issue of Applied's entitlement, the Board observed that "breach damages may include anticipatory profits." *Id.* (citing *Carchia v. United States*, 202 Ct. Cl. 723, 485 F.2d 622, 625

(Ct. Cl. 1973)).[2] On May 21, 2001, the Board denied the government's motion for reconsideration. *Applied II*, 01-2 B.C.A. (CCH) P 31,430. The government timely appealed the Board's decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10).[3]

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[2] The Board denied Applied's claim for anticipatory profits for the option year that DLA did not exercise. The Board also denied the government's motion for summary judgment dismissing Applied's appeal of DLA's unilateral determination of the termination for convenience settlement. *Applied I*, 01-1 B.C.A. (CCH) at 154,734. Since the termination settlement claim and the breach of contract claim sought the same anticipatory profits, the Board sustained both appeals "with the understanding that one of the appeals will be dismissed during the quantum phase after an agreement is reached or a determination is made as to the date when interest begins." *Applied I*, 01-1 B.C.A. (CCH) at 154,735.

[3] We have exclusive jurisdiction "of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978." 28 U.S.C. § 1295(a)(10) (emphasis added). The CDA provides that all claims must first be submitted to the contracting officer for a decision. See 41 U.S.C. § 605(a); *Dewey Elecs. Corp. v. United States*, 803 F.2d 650, 654 (Fed. Cir. 1986). After receiving an adverse decision from the contracting officer, the contractor may appeal that decision to the appropriate agency board of contract appeals. See 41 U.S.C. § 607; *Dewey*, 803 F.2d at 654. In view of the foregoing scheme, the breadth of issues covered in the contracting officer's decision "determines the extent of the contractor's right of appeal and the board's jurisdiction." *Id.* at 655. For example, in *Dewey*, we held that where the contracting officer decided only entitlement and the board thereafter decided entitlement and remanded to the parties regarding quantum, the board's decision was final and thus

## DISCUSSION

We review the Board's decision under the standard set forth in the CDA:

> The decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b). Because the parties do not dispute the facts relating to the preparation of the estimates, inclusion of the estimates in the RFP, and the termination of the

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appealable. *Id.* at 658.

In this case, Applied appealed two contracting officers' decisions to the Board. *Applied I*, 01-1 B.C.A. (CCH) at 154,733. In the first decision, the termination contracting officer denied Applied entitlement to under-absorbed overhead costs. In the second decision, the contracting officer denied Applied's claim for breach of contract. For its part, the Board only decided entitlement. *Applied I*, 01-1 B.C.A. (CCH) at 154,734. Accordingly, since the contracting officer did not decide quantum, but decided only entitlement, the Board's decision on entitlement is final and appealable to this court. See *Dewey*, 803 F.2d at 655 ("In rendering a decision as to entitlement . . . the Board decided all of the issues then before it . . . .").

contract, the sole question before us is whether the Board's decision is tainted by legal error. We review the Board's legal conclusions de novo. *Rex Sys. v. Cohen*, 224 F.3d 1367, 1371 (Fed. Cir. 2000); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1446 (Fed. Cir. 1997).

On appeal, the government does not dispute that DLA's estimates as to the number of R-12 and R-114 refrigerant cylinders that it would require during the contract term were significantly overstated. Neither does the government dispute that, prior to contract award, DLA was aware that the estimates were incorrect but did not inform Applied of the error until after the contract was awarded. The government asserts, however, that the Board erred as a matter of law (i) in holding that DLA breached its contract with Applied and (ii) in stating that, as far as damages are concerned, Applied is entitled to recover anticipatory profits. We address these contentions in turn.

## I.

The government argues that a requirements contract only obligates an agency to purchase from a contractor all its requirements for the items covered by the contract, at the agreed-upon price; it does not obligate the agency to purchase a particular quantity of items. Starting from that premise, the government contends that DLA did not promise to purchase the estimated quantity of approximately 120,000 cylinders and that, consequently, its failure to do so did not breach the contract. In short, under the government's reasoning, the fact that DLA awarded the contract to Applied knowing the estimates in the RFP were faulty is irrelevant for purposes of

determining whether there was a breach of contract. Applied responds that it is the law of this circuit that, by preparing estimates negligently, the government may breach a requirements contract even if it in fact fulfills such needs as it has for contract items from the contractor. The government's understanding as to the nature of a requirements contract is correct, but we agree with Applied that faulty estimates may form the basis for a claim that a requirements contract has been breached.

A requirements contract "calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). This arrangement offers the government a measure of both flexibility and cost certainty, by ensuring the government an adequate supply of the required item at an agreed price before it determines the exact quantity of items it ultimately will purchase. *Id.* In exchange for providing the government cost certainty and flexibility with respect to the quantity of items ordered, a contractor, at least in theory, may exact a higher per unit price. *Technical Assistance Int'l v. United States*, 150 F.3d 1369, 1372 (Fed. Cir. 1998).

While the quantity of items that the government will purchase under a requirements contract necessarily is uncertain, it is not irrelevant, as the quantity may impact both a contractor's capacity to supply the contract items and the price at which it agrees to supply them. *Medart*, 967 F.2d at 581. For that reason, as part of the solicitation for a requirements contract, the government prepares estimates of

the quantity of goods it will require during the term of the contract. These estimates, though "not guarantees or warranties of quantity," *Shader Contractors, Inc. v. United States*, 149 Ct. Cl. 535, 276 F.2d 1, 7 (Ct. Cl. 1960), constitute one of the only limitations on the government's otherwise almost unbridled flexibility with respect to the number of units it purchases. Therefore, there is an implied obligation upon the government to "act in good faith and use reasonable care in computing its estimated needs." *Medart*, 967 F.2d at 581. Failure to meet that obligation constitutes a breach of the resulting contract. *Id.* We have stated that, "where a contractor can show by preponderant evidence that estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made[,]' the government could be liable for appropriate damages resulting." *Id.* (quoting *Clearwater Forest Indus., Inc. v. United States*, 227 Ct. Cl. 386, 650 F.2d 233, 240 (Ct. Cl. 1981)). Accordingly, to the extent that a government estimate is inadequately or negligently prepared, its inclusion without correction in a solicitation or contract constitutes a misrepresentation that, whether deliberate or unintentional, amounts to a breach of contract. *Womack*, 389 F.2d at 800.

This case is squarely controlled by the jurisprudence that holds that negligently prepared estimates can give rise to a claim for breach of a requirements contract:

> It is not disputed that the Government knew it would actually need about one-tenth of the quantities in the solicitation. It did not exercise reasonable care when that knowledge,

> acquired well in advance of contract award, was not factored into the contract estimates. The Government was, therefore, negligent, and appellant is entitled to . . . damages for breach of the contract.

*Applied I*, 01-1 B.C.A. (CCH) at 154,734. In view of the undisputed facts, the Board did not err in holding that DLA breached the requirements contract and that Applied was entitled to recover the damages that resulted from the breach.[4]

## II.

As noted above, the Board only decided the issue of liability. It did not address quantum. The Board did, however, make statements concerning the recovery to which it believed Applied was entitled by reason of DLA's breach. In *Applied I*, the Board stated that Applied was entitled to "compensatory damages" for DLA's breach, and it observed that "breach damages may include anticipatory profits." *Applied I*, 01-1 B.C.A. (CCH) at 154,734. In *Applied II*, the Board stated that because DLA's breach was "total," Applied "is entitled to be made whole, and here that includes anticipatory profits to the extent they can be proved." *Applied II*, 01-2 B.C.A. (CCH)

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[4] As noted, the Board found that DLA's estimates were negligently prepared. The Board did not find bad faith on the part of DLA. A finding of bad faith is not a prerequisite to a claim for breach of contract based upon faulty estimates. As the Court of Claims explained in *Womack*, "an inadvertent misrepresentation stemming from negligence is fully as damaging as a deliberate one to the party who relies on it to his detriment." 389 F.2d at 800.

at 155,220. The Board's statements regarding quantum suggest that it is appropriate for us to provide guidance regarding the proper measure of Applied's recovery. See *Fla. E. Coast Ry. Co. v. United States*, 228 Ct. Cl. 647, 660 F.2d 474, 475 (Ct. Cl. 1981) (Though the trial judge had ruled only on the issue of liability and the determination of quantum was reserved for further proceedings, the court addressed quantum because it thought it "appropriate . . . to comment . . . for the further guidance of the parties and the trial judge, and to underscore [its] judgment as to a controverted important issue central to the case.").

The parties' respective positions on the damages issue are as follows: The government argues that when, under a requirements contract, an agency orders all the contract items it requires from a contractor, the contractor may not recover anticipatory profits to compensate it for the loss of sales that never occurred and to which it never was entitled under the contract. According to the government, a contractor's recovery for negligently prepared estimates is limited to reliance damages and a price adjustment. Applied submits that it is entitled to a recovery of compensatory damages that includes anticipatory profits. Applied contends that the proper measure of damages to compensate for DLA's breach is the profit it would have made on the entire quantity of cylinders that DLA negligently estimated it would require. For the reasons set forth below, we agree with the government that Applied is not entitled to anticipatory profits on the estimated quantity of cylinders.

As a general rule, when there has been a breach of contract, the non-breaching party is entitled to an award of

damages that will place it "in as good a position as [it] would have been in had the breaching party fully performed." *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996). This rule sets the floor for damages, by ensuring that the non-breaching party suffers no pecuniary loss as a result of the breach. It sets the ceiling for damages as well, because the non-breaching party is "not entitled to be put in a better position by the recovery than if the [breaching party] had fully performed the contract." *Miller v. Robertson*, 266 U.S. 243, 260, 69 L. Ed. 265, 45 S. Ct. 73 (1924). Put another way, "the non-breaching party 'should on no account get more than would have accrued if the contract had been performed.'" *White v. Delta Constr. Int'l, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002) (quoting *DPJ Co. v. FDIC*, 30 F.3d 247, 250 (1st Cir. 1994)). In order to recover anticipatory profits for the government's breach of a contract, the non-breaching party "must establish by a preponderance of the evidence" the requirements for such an award. *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1324-25 (Fed. Cir. 2002). "Lost profits are 'a recognized measure of damages where their loss is the proximate result of the breach and the fact that there would have been a profit is definitely established, and there is some basis on which a reasonable estimate of the amount of the profit can be made.'" *Cal. Fed. Bank v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001)(quoting *Neely v. United States*, 152 Ct. Cl. 137, 285 F.2d 438, 443 (Ct. Cl. 1961)).

Because the purpose of a damages award is to put the non-breaching party "in as good a position as [it] would have been in had the breaching party fully performed," *Wells Fargo Bank*, 88 F.3d at 1021, the logical starting point for a

damages analysis is an understanding of the breaching party's obligations under the contract. As explained above, a requirements contract "calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart*, 967 F.2d at 581. Court of Claims and Federal Circuit cases that support the award of anticipatory profits for the breach of a requirements contract all involve situations in which the government failed to perform this obligation because it had "actual requirements for specified supplies and services" but, in one way or another, diverted that business away from the party with whom it had contracted.

In *Locke v. United States*, 151 Ct. Cl. 262, 283 F.2d 521 (Ct. Cl. 1960), the government contracted to list the plaintiff's typewriter repair company, along with three other companies, in a Federal Supply Schedule. *Locke*, 283 F.2d at 522. Various departments of the federal government were required to use the contractors whose names appeared on the schedule. In exchange for the government's listing of his company in the schedule, Locke's company "was obligated to perform all the services for which he contracted." *Id.* at 523. After several months of listing Locke's company, during which time the company received business from the government, the government terminated the contract and struck the company from the schedule. Locke sued for breach of contract, seeking damages in the form of lost profits. After the Board of Review of the General Services Administration denied him relief, Locke filed suit in the Court of Claims.

In opposing Locke's breach claim, the government advanced essentially two arguments. First, it contended that since Locke's company had entered into a requirements contract, which did not guarantee that any minimum quantity of services would be ordered, Locke could not recover lost profits for providing services to which his company had no entitlement under the contract. Second, the government urged, it only agreed to list Locke's company, along with other typewriter-repair contractors. Because departments were free to choose any of the listed companies to perform the services at issue, the government's performance of the contract by continuing to list Locke's company did not guarantee the company any actual sales. The government contended that, under these circumstances, any award of lost profits was speculative and inappropriate. *Id.* The Court of Claims rejected the government's contentions. As for the first argument, the court stated:

> We agree that nothing in the contract would have prevented the Government from enlarging its own repair facilities to fill completely its needs. This would have left nothing to be awarded under the Federal Supply Schedule contracts. But the facts as alleged show that the Government did have some service requirements beyond its own capacity. Presumably, these requirements were awarded to contractors in the schedule. Plaintiff's chance of obtaining some of these awards, by being in the schedule and competing with the other contractors, had

> value in a business sense. The Government by its breach deprived plaintiff of this value.

*Id.* at 524 (emphasis in original).

In rejecting the government's second argument--that an award of anticipatory profits would be speculative--the court pointed out that it appeared that Locke "did have a chance of obtaining at least one-fourth of the total typewriter repair business let by the Government." *Id.* at 525. The court therefore referred the case to the trial commissioner for further proceedings, directing the trial commissioner to determine: (1) the total amount of typewriter-repair business that was let by the government and for which Locke would have been eligible but for the government's breach; (2) whether any material facts would have tended to prevent Locke from receiving its proportionate share of the business that was available; (3) the average unit cost normally incurred in performing the kind of repair work involved under the contract; and (4) the expenses that Locke would have incurred in performing its obligations under the contract. *Id.* Thus, in Locke, the Court of Claims held that the contractor was entitled to recovery to the extent of (i) the amount of typewriter-repair business that existed that it would have obtained; and (ii) its ability to satisfy the requirements for the recovery of lost profits stated in California Federal Bank.

In *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982), the government entered into a requirements contract with Soledad Enterprises, Inc. ("Soledad") for grounds maintenance and refuse removal at six Navy family housing projects. However, upon recognizing

that it could procure the contract services from the Department of the Navy's Public Works, the government diverted its rodent pest control services away from Soledad, in breach of the requirements contract. *Id.* at 758. The Court of Claims rejected the government's argument that because Soledad did not perform any pest control services under the requirements contract, the contract had been constructively terminated for the convenience of the government. The court stated that the termination for convenience clause does not allow the government to divert business away from a contractor and breach its only meaningful obligation under a requirements contract. *Id.* at 771. Significantly, though the court left the question of damages for further proceedings, it made clear Soledad's entitlement was not to an "obligatory minimum" number of calls for pest control work, but to "all of the buyer's requirements." *Id.* at 761.

Finally, in *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000), we reaffirmed the availability of lost profits compensation when the government breaches a requirements contract by procuring goods or services from third party sources. In that case, the plaintiffs entered into requirements contracts with the General Services Administration ("GSA") for transcription and court reporting services for various federal agencies. Each contract included the standard requirements clause found in FAR § 52.216-21(c). That clause states that, "except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." 48 C.F.R. § 52.216-21(c). However, none of the plaintiffs was assured

that any of the agencies would purchase its services. The government's sole obligation under the several contracts was to purchase from the pool comprised of the contracting plaintiffs all the transcription requirements of the listed agencies. It was stipulated that, during the period of the contracts, some of the agencies covered by the contracts contracted for transcription services with companies that were not parties to the GSA contracts. *Ace-Federal Reporters*, 226 F.3d at 1331. This was not permitted absent a waiver from GSA. *Id.* The plaintiffs filed claims with GSA's contracting officer, alleging that the off-schedule purchases by some agencies constituted a breach of contract. For the alleged breach, they sought to recover lost profits and consequential damages. After the contracting officer denied the claim and the GSA Board of Contract Appeals sustained the denial, the plaintiffs appealed to this court. Because we concluded that the Board had erred in holding that the terms of the contracts precluded recovery of lost profits damages, we reversed and remanded.

Recognizing that the contracts at issue were not typical requirement contracts and that they did not guarantee any of the individual contractors business, because the agencies were free to choose amongst the contractors for the provision of transcription services, we analogized to Locke. In both cases, the government asserted that the absence of any guarantee of obtaining work rendered lost profits too speculative to prove. Like the Court of Claims in *Locke*, we disagreed, holding that the government's promise to purchase transcription services only from the contractors on the schedule "had substantial business value because there were only between two and five authorized sources" for the services in each geographical

region. *Id.* at 1332. We concluded that, under these circumstances, by considering the total amount of transcription services the government purchased from third parties, along with other relevant factors, the court or the Board reasonably could determine the amount of actual business and profits that the plaintiffs lost as a result of the breach. *Id.* In other words, because the government's breach in *Ace-Federal* involved the diversion away from the non-breaching parties of actual business that they otherwise would have received (as in *Torncello* and *Locke*), the loss of profits was a "proximate result of the breach and . . . there [was] some basis on which a reasonable estimate of the amount of the profit [could] be made." *Cal. Fed. Bank*, 245 F.3d at 1349.

The combined teaching of *Locke*, *Torncello*, and *Ace-Federal* is that the government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery noted in California Federal Bank. The critical point is that the government's breach of its obligation "to fill all its actual requirements . . . by purchasing from the awardee," *Medart*, 967 F.2d at 581, has the effect of taking away from the contractor the opportunity to earn a profit.

This case, however, does not involve the kind of breach that occurred in *Locke*, *Torncello*, and *Ace-Federal*. DLA did not purchase from third parties the refrigerant cylinders that it was obligated, under the contract, to purchase from

Applied. Thus, unlike the government in those cases, it did not divert from a requirements contractor business that existed. To the contrary, it did order from Applied all of its actual requirements for refrigerant cylinders, although those requirements were far less than what had been estimated in the RFP. Eventually, the contract was terminated for the convenience of the government after Applied and DLA were unable to agree on an adjusted price for the cylinders. In short, the government did not commit the breach that occurred in *Locke*, *Torncello*, and *Ace Federal*; -- diverting business that existed away from the contractor.

The government's breach in this case was the inclusion of negligently prepared estimates in the RFP. For that breach, Applied is not entitled to recover the profits it would have made had DLA in fact had requirements to the extent of approximately 120,000 refrigerant cylinders. Allowing Applied to recover lost profits on the 120,000 estimated cylinders would effectively convert the contract at issue from one to satisfy all of DLA's requirements to one in which DLA guaranteed Applied a certain level of business. Contract estimates are "not guarantees or warranties of quantity," however. *Shader Contractors*, 276 F.2d at 7. No case has been cited to us in which, under a requirements contract, a contractor was allowed to recover anticipatory profits as damages for a breach of contract resulting from negligently prepared estimates.

In addition, in order to recover anticipatory profits, it must be "definitely established" that without the government's breach there would have been a profit. *Cal. Fed. Bank*, 245 F.3d at 1349. Applied cannot meet that requirement. Had

DLA discharged its duty by properly preparing and propounding the cylinder estimates, or if it had told offerors that the estimates were inaccurate before contract award, Applied would not have expected to sell, and it would not have sold, 120,000 cylinders. In other words, the profit Applied attempts to recover in the form of lost profits for anticipated sales would not "definitely" have existed but for DLA's breach.

Finally, awarding Applied damages in the form of lost profits would allow Applied to profit from DLA's breach. If DLA had furnished a reasonable estimate of its cylinder needs for the term of the contract, one of two things would have occurred: either Applied would have submitted a bid and been awarded the contract, in which case it perhaps would have earned a profit on the number of cylinders it sold; or Applied would have declined to bid on the contract, in which case it would have earned no profit. To the extent that it is allowed to recover a profit based upon the 120,000 units of cylinders included in DLA's negligently prepared estimates, Applied would find itself in a better pecuniary position than if DLA had never propounded the inflated estimates and breached the contract. As noted above, such a damages award would squarely conflict with the rule that a non-breaching party "should on no account get more than would have accrued if the contract had been performed." *Delta Constr. Int'l*, 285 F.3d at 1043.

In our view, *Everett Plywood v. United States*, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969), suggests the proper methodology for determining the recovery to which a contractor is entitled by reason of the kind of breach that

occurred here. In that case, the plaintiff agreed to cut and purchase timber located in the Snoqualmie National Forest in the State of Washington. In its prospectus issued before award of the contract, the United States Forest Service estimated the total volume of timber in the specified area to be approximately 73,100 M board feet. *Id.* at 427. Though Everett Plywood's agreement to purchase the timber from the Forest Service was not a requirements contract, the estimates of volume were material to the contract. The estimates were inaccurate, as the total volume of timber that Everett Plywood was able to cut and purchase under the contract was 46,081 M board feet, or approximately 27,000 fewer M board feet than the Forest Service had estimated in the prospectus.

The Court of Claims calculated the damages resulting from the breach. The court pointed out that because of the Forest Service's inaccurate estimate, Everett Plywood cut less timber than it expected when bidding on the contract. Its per unit cutting costs therefore increased. Accordingly, Everett Plywood "suffered damages . . . as a reasonably foreseeable result of defendant's breach of warranty, by failing to realize the advantages of the lower average rates which would have resulted" from cutting a larger volume of timber. *Id.* at 433. The court therefore calculated "the average rate which plaintiff would have paid . . . had the contract volume . . . been realized." *Id.* Then, to compute the damages to which Everett Plywood was entitled, the court applied the difference between that rate, which Everett Plywood would have paid had the government's estimates been accurate, and the contract rate, for the volume actually cut, "to arrive at the excess payment . . . resulting from plaintiff's failure to realize the lower average rate contemplated." *Id.* In other words,

Everett Plywood was entitled to compensation for the loss it incurred as a result of the Forest Service's faulty estimate, in the form of an adjustment to the contract price applied to the volume of timber actually cut under the contract.

Similarly, in *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506 (1993), the court stated: "Where a contractor can show by preponderant evidence that estimates it relied on were negligently prepared or were unreasonably inadequate, indicating a lack of due care in their preparation at the time the estimates were made, the government may be liable for resulting damages." *Id.* at 520. The court further stated that, in such a situation, the contractor "is entitled to be paid the reasonable value of the work performed." *Id.* at 524. The court explained that paying the contractor the reasonable value of the work performed may involve increasing the contract price. This is because "when actual work performance produces a lower number of items, the cost allocation per work item [is] higher than was the bid price[,] which was based on a higher number of work items and an attendant lower cost allocation per item of work." *Id. See also In re Cactus Press/Power Enters., Inc.*, GPOBCA 20-99 (Jan. 31, 2001) (recognizing "the well-settled principle relating to 'requirements contracts' which holds that contractors who submit bids in reliance on negligently prepared and incorrect estimates of work in the solicitation are entitled to an equitable adjustment" (citations omitted)); *HKH Capitol Hotel Corp.*, ASBCA No. 47,575, 98-1 B.C.A. (CCH) P 29548, at 146,472 (Jan. 26, 1998) ("Where the Government's estimate is negligently prepared and appellant reasonably relies upon that estimate to its financial detriment, the remedy is an equitable adjustment."

(citation omitted)); John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 1205 (3d ed. 1998) (stating that relief for faulty government overestimates "has been measured by repricing the contract quantities based on an accurate estimate of the quantities of work. Such repricing places the contractor in the position it would have occupied but for the Government breach.").

It does not appear from the record before us that Applied delivered any cylinders before DLA terminated the contract for the convenience of the government. If any cylinders were delivered, Applied should have the opportunity to establish that it is entitled to an equitable adjustment in the price of those cylinders because it relied on DLA's negligent estimates and, as a result, suffered damages. We note that, in denying Applied's breach claim, DLA's contracting officer referenced such an approach. The contracting officer noted that "an equitable adjustment compensates for changes by paying a contractor its increased costs resulting from the change, plus an allowance for profit on that cost." *See United States v. Callahan Walker Constr. Co.*, 317 U.S. 56, 61, 87 L. Ed. 49, 63 S. Ct. 113, 96 Ct. Cl. 616 (1942) ("An 'equitable adjustment' . . . involved merely the ascertainment of the cost of [additional work] . . . and the addition to that cost of a reasonable and customary allowance for profit."); *Earth Burners, Inc. v. United States*, 43 Fed. Cl. 481, 482 (1999) (noting that "the proper measure of an equitable adjustment is reasonable costs, including reasonable profit for the work performed" (citation omitted)); *Gen. Ry. Signal Co.*, ENGBCA No. 6168, 1995 Eng. BCA LEXIS 24, 96-1 B.C.A. (CCH) P 27981, at 139,755 (Aug. 3, 1995) ("We conclude that the equitable adjustment for the switching

machines should be measured by the contractor's reasonable cost plus an allowance for a fair and customary profit." (citation omitted)). We think the approach of an equitable adjustment properly assesses Applied's damages.[5]

If, as appears to be the case, no cylinders were delivered, Applied is limited to recourse under the Termination for Convenience of the Government Clause of the contract. As noted above, Applied's termination settlement claim and breach of contract claim sought the same anticipatory profits. As we have explained, however, Applied is not entitled to recover such profits. Accordingly, any further proceedings before the Board will be limited to disposing of any other outstanding issues in connection with Applied's termination settlement claim.

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[5] The case on which the Board relied for the proposition that Applied's breach damages may include anticipatory profits, *Carchia*, 202 Ct. Cl. 723, 485 F.2d 622, is inapposite. In *Carchia*, the government wrongfully terminated a construction contract for default. At the time, a wrongful default termination was treated as a breach of contract. As the Court of Claims stated, "since this was an old-style contract which did not provide that a wrongful default termination was to be considered a convenience-termination, plaintiff was entitled to anticipated profits for work not yet performed at the time it received the improper notice of default termination." *Id.* at 625. In *Carchia*, the government did not dispute entitlement to anticipated profits, only the amount of such profits.

## CONCLUSION

The decision of the Board holding that DLA breached its requirements contract with Appiied is affirmed.

## COSTS

No costs.

AFFIRMED.

## DISSENT

DYK, Circuit Judge, concurring in part and dissenting in part.

In the present contract the government undertook two relevant obligations: (1) to purchase its actual requirements from the plaintiff and (2) to accurately estimate its requirements. There was no breach of the first obligation, but the majority holds that the second obligation was breached because the government, either in bad faith or negligently, provided an incorrect estimate. I am in full agreement with the majority so far. Having found that the second obligation was breached, however, the majority unaccountably denies the plaintiff's claim for lost profits for the admitted breach. The measure of damages the majority uses is unsupported by our precedent and contrary to the general law of contracts. Moreover, it leaves the contractor completely uncompensated for the breach and provides almost no incentive for the

government to avoid such breaches in the future. I respectfully dissent.

The majority cites no case in which there was a bad faith or negligent misrepresentation in a requirements contract but lost profits were denied. In *Everett Plywood & Door Corp. v. United States*, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969), *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506 (Fed. Cl. 1993), *Cactus Press/Power Enterprises, Inc.*, GPOBCA 20-99 (Bd. Contract App. Jan. 31, 2001), and *HKH Capitol Hotel Corp.*, ASBCA No. 47,575, 98-1 B.C.A. (CCH) P 29,548, at 146,467 (Jan. 26, 1998), cited by the majority as support for denying lost profits, *ante* at 20-22, the plaintiffs did not seek lost profits for a governmental misrepresentation. Thus, those opinions' silence as to the possibility of lost profits recovery for misrepresentation is completely without significance.

In *Everett Plywood* the plaintiff contracted with the Forest Service to purchase timber on a parcel of government land for a price that would decrease over time, so that the plaintiff would pay less per unit for the timber the more timber it cut and purchased. 419 F.2d at 427. The government negligently misrepresented how much timber was on the parcel so that the plaintiff's average cost per unit was higher than it had contemplated. *Id.* at 429. The plaintiff sought a price adjustment, and our predecessor court awarded the difference between the per unit price the contractor had to pay for the timber it cut and the effective price per unit it would have paid for the timber if the contractor had been able to cut the quantity estimated by the Forest Service. *Everett*, 419 F.2d at 433. There is no indication that the plaintiff sought lost

profits, and the opinion does not discuss or even mention a lost profits issue.

In none of the other cited cases involving negligent misrepresentation did the contractor seek lost profits. In *Crown Laundry*, the contractor sought only equitable adjustment of the contract, and the parties stipulated the actual dollar amount of damages at the outset were the contractor to prevail. 29 Fed. Cl. at 514. Likewise, in *Cactus Press*, the contractor sought only equitable adjustment of the contract price. The same is true of *HKH Capitol Hotel Corp.* 98-1 B.C.A. P 29,548 at 146,471. The equitable adjustment sought by the contractors in those cases appears to have consisted mainly of increased costs associated with the unexpected volume. But in *Crown Laundry* the amount of damages was not disputed, and in neither *Cactus Press* nor *HKH Capitol Hotel Corp* did the Board find that the contractor was entitled to an equitable adjustment.[1] Those cases therefore did not reach the question of what measure should be used. The statements in each case that equitable adjustment of the contract price was available to the contractor (if it could establish that it was harmed by a negligently prepared bid) simply restated the claim asserted by the contractor. Those

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[1] In *Cactus Press*, the Board rejected the contractor's claim because it was untimely. In *HKH Capitol Hotel Corp.*, the contractor's claim was barred because the contractor did not seek clarification of a patent ambiguity in the contract relating to the estimate. *HKH Capitol*, 98-1 B.C.A. (CCH) P 29,548 at 146,472

statements were not addressed to lost profits and have no bearing on lost profit recovery.[2]

Without a controlling precedent, this court "applies ordinary principles of contract construction and breach." *United States v. Winstar Corp.*, 518 U.S. 839, 871, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996)(plurality opinion); accord *Lynch v. United States*, 292 U.S. 571, 579, 78 L. Ed. 1434, 54 S. Ct. 840 (1934) ("rights and duties" of government contract "are governed generally by the law applicable to contracts between private individuals."). The majority must recognize that there is no controlling precedent in this area, as it observes that "no case has been cited to us in which, under a requirements contract, a contractor was allowed to recover anticipatory profits as damages for a breach of contract resulting from negligently prepared estimates," *ante* at 19, and then it cites no case in which, in that situation, lost profits have been denied. Accordingly, we must look to the general law of contracts.

As the majority recognizes, the rule in this area is that lost profits are available to the non-breaching party, assuming foreseeability. As we have said,

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[2] Equally inapplicable, so far as computation of damages is concerned, are the diversion cases, when lost profits recovery is allowed because the government has improperly diverted orders to other sellers. *Ante* at 13-18 (discussing *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000); *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982); *Locke v. United States*, 151 Ct. Cl. 262, 283 F.2d 521 (Ct. Cl. 1960)).

> "One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred." *Glendale Federal Bank FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001) (citing Restatement (Second) of Contracts § 344(a)(1981)). A party's expectation interest is the "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." Restatement (Second) of Contracts § 344(a)(1981). Expectation damages are recoverable provided they are actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty.

*Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (emphasis added). The leading authorities on contracts agree that the normal measure of damages includes lost profits. As it was put in the First Restatement of Contracts, "compensatory damages will be given for the net amount of the losses caused and gains prevented, in excess of savings made possible." Restatement (First) of Contracts § 329 cmt. a (1932). *See also* Arthur Linton Corbin, *Corbin on Contracts* § 992 (Interim ed. 2002) (quoting First Restatement with approval); Restatement (Second) of Contracts § 347 (1981).

To determine how to calculate the gains prevented by Defense Logistics Agency's ("DLA") breach, we should look

to breach of warranty cases. If DLA had warranted to Applied Companies, Inc. ("Applied) that the requirements contract would provide 120,000 cylinders' worth of work, damages would be awarded to compensate the contractor for the benefit of the expected bargain, not for the value of the contract as it was without the misrepresentation. For example, the Uniform Commercial Code provides, "The measure of damages for breach of warranty is the difference . . . between the value of the goods accepted and the value they would have had if they had been as warranted." UCC § 2-714(2) (1989). This is in keeping with the rule that "ordinarily, the damages recoverable for a breach of contract are measured on the basis of the value of the *promised performance*." Corbin, *supra*, § 1030 (emphasis added).

To be sure, in this case there was, in effect, only a warranty that the requirements were properly estimated; the quantity ordered could have been higher or lower. But such uncertainty, contrary to the majority's assertion, does not bar recovery. Although we have not specifically addressed the lost profits issue, we have repeatedly recognized that when the government allows bidding on either requirements or indefinite quantities contracts, it is reasonable and foreseeable for contractors to rely on government estimates. *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992) ("Presumably contractors rely on the [government's] proffered estimates in formulating their bids, so the government must act in good faith and use reasonable care in computing its estimated needs"); *Clearwater Forest Indus., Inc. v. United States*, 227 Ct. Cl. 386, 650 F.2d 233, 239 (Ct. Cl. 1981) ("[A] prospective purchaser should reasonably be expected to base his operating plans and cost estimates on [government

estimates]"); *Womack v. United States*, 182 Ct. Cl. 399, 389 F.2d 793, 801 (Ct. Cl. 1968) ("Assuming that the bidder acts reasonably, he is entitled to rely on Government estimates as representing honest and informed conclusions."). Indeed, it is the very purpose of quantity estimates to induce such reliance; otherwise, as our predecessor court said, the estimate would be "surplussage at best or deception at worst." *Womack*, 389 F.2d at 801.

Where such reliance is reasonable, "if a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery." *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) (quoting *Locke v. United States*, 151 Ct. Cl. 262, 283 F.2d 521, 524 (Ct. Cl. 1960)). In circumstances in which the breach destroyed all value and made recovery under the contract impossible, courts have measured the value of the contract right at the time of the breach. Corbin, *supra*, § 1030; E. Allen Farnsworth, *Farnsworth on Contracts* § 12.15 (2d ed. 1998). So too, at the time the government made the contract with Applied, it was worth something definite, of which the government's estimate was highly probative. Alternatively, recovery could be based on other evidence of the contract value -- how Applied valued the contract when it was signed, for example, or how other, similarly situated companies valued requirements contracts. See Farnsworth, *supra*, § 12.15. Taking into account expected variations from the estimate, the Board should award lost profits based on the amount of likely purchases given the estimate. It is particularly inappropriate for the majority to foreclose lost profit damages at this stage, before Applied has even had the opportunity to present evidence on the matter.

The majority holds that an award of lost profits would overcompensate Applied because, had the government disclosed its actual requirements, Applied would have either "submitted a bid" on the contract as it was or "declined to bid on the contract and thus made no profit at all." *Ante* at 20. In short, the majority contends, it would have been impossible for Applied to recover the profits on this contract, because even absent the breach, Applied "would not have expected to sell, and it would not have sold, 120,000 cylinders." *Ante* at 19. But that characterization removes the misrepresentation from the measure of damages, as if it had never happened. The famous Bristol Seed case, treated by Corbin, provides an illustration of the majority's approach. Corbin, *supra*, § 1026 (describing *White v. Miller*, 71 N.Y. 118 (N.Y. 1877)). In that case, the buyer purchased seed from a seller who warranted that it was fit for human consumption. It was in fact mixed seed only good for animal feed. The buyer was due damages based on the difference between the value of the seed as warranted and the value of the actual seed, including lost profits. *Id.* Under the majority's theory of damages, however, the buyer could not recover expected profits because there would not have been any; the seed was unfit for human consumption.

Here the contractor assumed the risk that the government's requirements would actually be less than the estimate; the contractor did not assume the risk that the government's requirements estimate would be deliberately or negligently misstated. The majority's measure of damages thus effectively erases the breach. Far from "converting the contract . . . to one in which DLA guaranteed Applied a certain level of business," as the majority asserts, *ante* at 19,

awarding lost profits merely reflects the general measure of damages.

The consequence of today's decision is that the government may misrepresent its requirements with impunity so long as the contractor suffers no increase in costs. That seems to me to be bad policy as well as bad law. I respectfully dissent.

325 F.3d 1328

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**01-1630**

**[Dated December 10, 2002]**

| | |
|---|---|
| Donald H. Rumsfeld, SECRETARY OF DEFENSE, Appellant, | ) |
| v. | ) |
| APPLIED COMPANIES, INC., Appellee. | ) |

## JUDGMENT

*On Appeal from the* ARMED SERVICES BOARD OF CONTRACT APPEALS

*in CASE NO(S).* 50749, 50896, and 51662

*This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:* AFFIRMED

*ENTERED BY ORDER OF THE COURT*

/s/ _____
*Jan Horbaly, Clerk*

*DATED* DEC 10 2002

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**01-1630**

**[Decided December 10, 2002]**

Donald H. Rumsfeld, SECRETARY OF DEFENSE,
Appellant,

v.

APPLIED COMPANIES, INC.,
Appellee.

**JUDGES:**
Before SCHALL, DYK, and PROST, Circuit Judges. Opinion for the Court filed by Circuit Judge SCHALL. Opinion concurring-in-part and dissenting-in-part filed by Circuit Judge DYK.

### OPINION

SCHALL, Circuit Judge.

This suit arises from a requirements contract between the Defense Logistics Agency ("DLA"), a component of the Department of Defense, and Applied Companies, Inc.

("Applied"). Under the contract, among other things, DLA was to purchase from Applied all of its requirements for two types of refrigerant storage cylinders during the period from June of 1994 through June of 1995, with an option year. In its request for proposals ("RFP"), DLA estimated its annual requirements for the two types of cylinders at 62,945 and 56,550 units, respectively. Prior to contract award, DLA determined that the estimates in the RFP were greatly overstated. However, this information was not communicated to any of the offerors, including Applied. Applied was awarded the contract, but after ordering only approximately 10% of the estimated quantity of cylinders, DLA terminated the contract for convenience on February 6, 1995.

Following the denial of its termination for convenience settlement proposal and a claim for breach of contract, Applied appealed to the Armed Services Board of Contract Appeals ("Board") under the provisions of the Contract Disputes Act, 41 U.S.C. § § 601-613 ("CDA"). Ruling on cross-motions for summary judgment, the Board concluded that DLA had breached the requirements contract by negligently failing to inform Applied that the estimates of its cylinder requirements in the RFP were inaccurate. Determination of the amount of damages was reserved for further proceedings. *Applied Cos., Inc.* , ASBCA Nos. 50,749, 50,896, and 51,662, 2001-1 B.C.A. (CCH) P 31,325 (Feb. 26, 2001) ("*Applied I*"). DLA's subsequent motion for reconsideration was denied. *Applied Cos., Inc.* , ASBCA Nos. 50,749, 50,896, and 51,662, 2001-2 B.C.A. (CCH) P 31,430 (May 21, 2001) ("*Applied II*"). The Secretary of Defense ("government") now appeals the Board's decision. Because the Board did not err in holding that DLA had breached its contract with Applied, we affirm.

## BACKGROUND

### I.

The pertinent facts, which are not in dispute, are set forth in *Applied I.* They are as follows:

The requirements contract stemmed from a procurement for cylinders to store R-12 and R-114 refrigerants, which are classified as "Class I Ozone Depleting Substances," or "ODSs." *Applied I*, 01-1 B.C.A. at 154,730. DLA, which was charged with building and maintaining a stockpile of ODSs for the Department of Defense, assessed the existing inventories of ODSs, the amount of ODSs likely to be used and recycled, and the amount of ODSs needed to ensure availability for mission critical uses. In June of 1993, based on its assessment, DLA developed estimates of the amount of R-12 and R-114 refrigerants that it needed to acquire and, by extension, the number of cylinders that would be required to store those refrigerants. *Id.* On July 14, 1993, DLA issued the RFP for the requirements contract. DLA estimated in the RFP that 62,945 cylinders would be needed for the storage of R-12 refrigerants and that 56,550 cylinders would be needed for the storage of R-114 refrigerants, for a total of approximately 120,000 cylinders during the one year term of the contract.[1] *Id.* The RFP stated that the variation in actual quantity purchased would be "plus 03% minus 03%." The estimated quantities were the same for the option year. *Id.* On

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[1] The RFP and contract involved other sizes and models of cylinders that are not at issue in this dispute. In the interest of clarity, we hereafter refer to the two types of cylinders at issue as the "cylinders" covered by the contract.

or about August 11, 1993, Applied, among others, responded to the RFP. Applied was the lowest responsive offeror.

In January of 1994, after initiating a pre-award survey, DLA determined that the reserve requirements for R-12 and R-114 refrigerants were considerably lower than previously believed. *Id.* at 154,731. As a result, DLA established that the number of R-12 and R-114 storage cylinders that would be needed during the upcoming year were 2,555 and 1,037, respectively. *Id.*

On June 20, 1994, DLA awarded the requirements contract to Applied, accepting its bid of $ 52.60 per cylinder. *Id.* In the notice of award, DLA repeated the estimates contained in the RFP. Under the contract, for the period June 20, 1994, to June 14, 1995, DLA was obligated to "order from the contractor all the [cylinders] that are required to be purchased by the Government." The contract also provided that the "quantities of [cylinders] specified in the schedule are estimates only and are not purchased by this contract." The contract incorporated various clauses from the Federal Acquisition Regulations ("FAR").

In August of 1994, DLA informed Applied--for the first time--that it had "discovered that a significant mistake was made in calculating the estimates." *Id.* In place of the erroneous estimates contained in both the RFP and the contract, DLA provided new estimates of the minimum and maximum quantities of R-12 and R-114 refrigerant cylinders actually purchased that it would require. *Id.* DLA eventually purchased a total of approximately 11,500 units of R-12 and R-114 cylinders, approximately one-tenth of the total quantity originally estimated. *Id.*

DLA sought to modify the contract to reflect the new estimates. Applied responded by submitting a revised price of $126.98 per unit for the approximately 11,500 cylinders actually purchased and requesting payment for $615,945 in "under absorbed indirect costs." *Id.* DLA replied by proposing to pay $79 per unit for the reduced quantity of cylinders. Applied did not accept this proposal, and on February 6, 1995, DLA terminated the contract for convenience. *Id.* at 154,732.

Applied submitted a termination for convenience settlement proposal in the amount of $1,791,499.00, to compensate it for the shortfall in the cylinders ordered by DLA and for the overhead it allegedly absorbed in the course of preparing for and performing its obligations under the contract. *Id.* On February 26, 1997, by unilateral determination, the termination contracting officer denied payment for under-absorbed overhead costs and unilaterally settled Applied's termination claim for $295,253.00. *Id.* This sum covered Applied's costs of terminating its work in progress and $31,718.00 for profit relating to work in progress. Since Applied already had received partial payments under the contract totaling $295,253.00, the termination contracting officer determined that Applied was not entitled to any payment by way of termination settlement. *Id.*

Applied subsequently submitted to the contracting officer a claim for breach of contract. Applied alleged that it had relied on DLA's faulty estimates in preparing and submitting its bid and had entered into agreements with subcontractors and suppliers accordingly. *Id.* at 154,733. Based on the estimates contained in the RFP and contract, Applied asserted, it had expected to generate a profit of $8.85 per

cylinder on approximately 119,495 cylinders, for a total profit of $1,057,530.80. *Id.* According to Applied, DLA's negligence in the preparation of the estimates constituted a breach of contract that entitled Applied "to recover damages in the amount of its anticipated profit."

On June 12, 1998, the contracting officer issued a final decision denying Applied's breach claim. *Id.* Though the contracting officer concluded that DLA had failed to exercise due care in the preparation of its estimates, she viewed that negligence as giving rise to a constructive change, rather than a breach, of the contract between DLA and Applied. Accordingly, she ruled that, in terms of relief, Applied was limited to an equitable adjustment under the Changes Clause of the contract, see FAR 52.243-1(b), 48 C.F.R. § 52.243-1(b), or to the recovery of the costs it had incurred plus a reasonable profit, as contemplated by the Termination for Convenience Clause, see FAR 52.249- 2(f)(2), 48 C.F.R. § 52.249-2(f). The contracting officer stated that whatever costs Applied could have established under a theory of constructive change or partial termination for convenience would have been paid as part of the termination settlement.

## II.

Applied appealed the two contracting officers' decisions to the Board. Ruling on the parties' cross-motions for summary judgment, the Board addressed the question of whether DLA's negligent inclusion of inaccurate estimates in the RFP was a breach of its requirements contract with Applied. Noting the undisputed fact that "the Government knew it would actually need about one-tenth of the quantities in the solicitation," and relying on the decision of the Court

of Claims in *Womack v. United States*, 182 Ct. Cl. 399, 389 F.2d 793 (Ct. Cl. 1968), the Board ruled that DLA's actions constituted a breach of the contract that entitled Applied to compensatory damages: "The Government was . . . negligent, and appellant is entitled to . . . damages for breach of the contract." *Applied I*, 01-1 B.C.A. at 154,734. The Board therefore granted Applied's motion for summary judgment. Finally, while it noted that its decision only addressed the issue of Applied's entitlement, the Board observed that "breach damages may include anticipatory profits." *Id.* (citing *Carchia v. United States*, 202 Ct. Cl. 723, 485 F.2d 622, 625 (Ct. Cl. 1973)).[2] On May 21, 2001, the Board denied the government's motion for reconsideration. *Applied II*, 01-2 B.C.A. P 31,430. The government timely appealed the Board's decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10).[3]

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[2] The Board denied Applied's claim for anticipatory profits for the option year that DLA did not exercise. The Board also denied the government's motion for summary judgment dismissing Applied's appeal of DLA's unilateral determination of the termination for convenience settlement. *Applied I*, 01-1 B.C.A. at 154,734. Since the termination settlement claim and the breach of contract claim sought the same lost profits, the Board sustained both appeals "with the understanding that one of the appeals will be dismissed during the quantum phase after an agreement is reached or a determination is made as to the date when interest begins." *Id.* at 154,735.

[3] We have exclusive jurisdiction "of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978." 28 U.S.C. § 1295(a)(10) (emphasis added). The CDA provides that all claims must first be submitted to the contracting officer for a decision. See

## DISCUSSION

We review the Board's decision under the standard set forth in the CDA:

> The decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not

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41 U.S.C. § 605(a); *Dewey Elecs. Corp. v. United States*, 803 F.2d 650, 654 (Fed. Cir. 1986). After receiving an adverse decision from the contracting officer, the contractor may appeal that decision to the appropriate agency board of contract appeals. See 41 U.S.C. § 607; *Dewey*, 803 F.2d at 654. In view of the foregoing scheme, the breadth of issues covered in the contracting officer's decision "determines the extent of the contractor's right of appeal and the board's jurisdiction." *Id.* at 655. For example, in *Dewey*, we held that where the contracting officer decided only entitlement and the board thereafter decided entitlement and remanded to the parties regarding quantum, the board's decision was final and thus appealable. *Id.* at 658.

In this case, Applied appealed two contracting officers' decisions to the Board. *Applied I*, 01-1 B.C.A. at 154,733. In the first decision, the termination contracting officer denied Applied entitlement to under-absorbed overhead costs. In the second decision, the contracting officer denied Applied's claim for breach of contract. For its part, the Board only decided entitlement. *Id.* at 154,734. Accordingly, since the contracting officer did not decide quantum, but decided only entitlement, the Board's decision on entitlement is final and appealable to this court. See *Dewey*, 803 F.2d at 655 ("In rendering a decision as to entitlement . . . the Board decided all of the issues then before it . . . .").

> be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

41 U.S.C. § 609(b). Because the parties do not dispute the facts relating to the preparation of the estimates, inclusion of the estimates in the RFP, and the termination of the contract, the sole question before us is whether the Board's decision is tainted by legal error. We review the Board's legal conclusions de novo. *Rex Sys. v. Cohen*, 224 F.3d 1367, 1371 (Fed. Cir. 2000); *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1446 (Fed. Cir. 1997).

On appeal, the government does not dispute that DLA's estimates as to the number of R-12 and R-114 refrigerant cylinders that it would require during the contract term were significantly overstated. Neither does the government dispute that, prior to contract award, DLA was aware that the estimates were incorrect but did not inform Applied of the error until after the contract was awarded. The government asserts, however, that the Board erred as a matter of law (i) in holding that DLA breached its contract with Applied and (ii) in stating that, as far as damages are concerned, Applied is entitled to recover anticipatory profits. We address these contentions in turn.

## I.

The government argues that a requirements contract only obligates an agency to purchase from a contractor all its requirements for the items covered by the contract, at the

agreed-upon price; it does not obligate the agency to purchase a particular quantity of items. Starting from that premise, the government contends that DLA did not promise to purchase the estimated quantity of approximately 120,000 cylinders and that, consequently, its failure to do so did not breach the contract. In short, under the government's reasoning, the fact that DLA awarded the contract to Applied knowing the estimates in the RFP were faulty is irrelevant for purposes of determining whether there was a breach of contract. Applied responds that it is the law of this circuit that, by preparing estimates negligently, the government may breach a requirements contract even if it in fact fulfills such needs as it has for contract items from the contractor. The government's understanding as to the nature of a requirements contract is correct, but we agree with Applied that faulty estimates may form the basis for a claim that a requirements contract has been breached.

A requirements contract "calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). This arrangement offers the government a measure of both flexibility and cost certainty, by ensuring the government an adequate supply of the required item at an agreed price before it determines the exact quantity of items it ultimately will purchase. *Id.* In exchange for providing the government cost certainty and flexibility with respect to the quantity of items ordered, a contractor, at least in theory, may exact a higher per unit price. *Technical Assistance Int'l v. United States*, 150 F.3d 1369, 1372 (Fed. Cir. 1998).

While the quantity of items that the government will purchase under a requirements contract necessarily is uncertain, it is not irrelevant, as the quantity may impact both a contractor's capacity to supply the contract items and the price at which it agrees to supply them. *Medart*, 967 F.2d at 581. For that reason, as part of the solicitation for a requirements contract, the government prepares estimates of the quantity of goods it will require during the term of the contract. These estimates, though "not guarantees or warranties of quantity," *Shader Contractors, Inc. v. United States*, 149 Ct. Cl. 535, 276 F.2d 1, 7 (Ct. Cl. 1960), constitute one of the only limitations on the government's otherwise almost unbridled flexibility with respect to the number of units it purchases. Therefore, there is an implied obligation upon the government to "act in good faith and use reasonable care in computing its estimated needs." *Medart*, 967 F.2d at 581. Failure to meet that obligation constitutes a breach of the resulting contract. *Id.* We have stated that, "where a contractor can show by preponderant evidence that estimates were 'inadequately or negligently prepared, not in good faith, or grossly or unreasonably inadequate at the time the estimate was made[,]' the government could be liable for appropriate damages resulting." *Id.* (quoting *Clearwater Forest Indus., Inc. v. United States*, 227 Ct. Cl. 386, 650 F.2d 233, 240 (Ct. Cl. 1981)). Accordingly, to the extent that a government estimate is inadequately or negligently prepared, its inclusion without correction in a solicitation or contract constitutes a misrepresentation that, whether deliberate or unintentional, amounts to a breach of contract. *Womack*, 389 F.2d at 800.

This case is squarely controlled by the jurisprudence that holds that negligently prepared estimates can give rise to a claim for breach of a requirements contract:

> It is not disputed that the Government knew it would actually need about one-tenth of the quantities in the solicitation. It did not exercise reasonable care when that knowledge, acquired well in advance of contract award, was not factored into the contract estimates. The Government was, therefore, negligent, and appellant is entitled to . . . damages for breach of the contract.

*Applied I*, 01-1 B.C.A. at 154,734. In view of the undisputed facts, the Board did not err in holding that DLA breached the requirements contract and that Applied was entitled to recover the damages that resulted from the breach.[4]

## II.

As noted above, the Board only decided the issue of liability. It did not address quantum. The Board did, however, make statements concerning the recovery to which it believed Applied was entitled by reason of DLA's breach. In *Applied*

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[4] As noted, the Board found that DLA's estimates were negligently prepared. The Board did not find bad faith on the part of DLA. A finding of bad faith is not a prerequisite to a claim for breach of contract based upon faulty estimates. As the Court of Claims explained in *Womack*, "an inadvertent misrepresentation stemming from negligence is fully as damaging as a deliberate one to the party who relies on it to his detriment." 389 F.2d at 800.

*I*, the Board stated that Applied was entitled to "compensatory damages" for DLA's breach, and it observed that "breach damages may include anticipatory profits." 2001-2 B.C.A. (CCH) P31430 at 154,734. In *Applied II*, the Board stated that because DLA's breach was "total," Applied "is entitled to be made whole, and here that includes anticipatory profits to the extent they can be proved." 01-2 B.C.A. at 155,220. The Board's statements regarding quantum suggest that it is appropriate for us to provide guidance regarding the proper measure of Applied's recovery. See *Fla. E. Coast Ry. Co. v. United States*, 228 Ct. Cl. 647, 660 F.2d 474, 475 (Ct. Cl. 1981) (Though the trial judge had ruled only on the issue of liability and the determination of quantum was reserved for further proceedings, the court addressed quantum because it thought it "appropriate . . . to comment . . . for the further guidance of the parties and the trial judge, and to underscore [its] judgment as to a controverted important issue central to the case.").

The parties' respective positions on the damages issue are as follows: The government argues that when, under a requirements contract, an agency purchases all the contract items it requires from a contractor, the contractor may not recover anticipatory profits to compensate it for the loss of sales that never occurred and to which it never was entitled under the contract. According to the government, a contractor's recovery for negligently prepared estimates is limited to reliance damages and a price adjustment. Applied submits that it is entitled to a recovery of compensatory damages that includes anticipatory profits. Applied contends that the proper measure of damages to compensate for DLA's breach is the profit it would have made on the entire quantity of cylinders that DLA negligently estimated it would require.

For the reasons set forth below, we agree with the government that Applied is not entitled to anticipatory profits on the estimated quantity of cylinders.

As a general rule, when there has been a breach of contract, the non-breaching party is entitled to an award of damages that will place it "in as good a position as [it] would have been in had the breaching party fully performed." *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1021 (Fed. Cir. 1996). This rule sets the floor for damages, by ensuring that the non-breaching party suffers no pecuniary loss as a result of the breach. It sets the ceiling for damages as well, because the non-breaching party is "not entitled to be put in a better position by the recovery than if the [breaching party] had fully performed the contract." *Miller v. Robertson*, 266 U.S. 243, 260, 69 L. Ed. 265, 45 S. Ct. 73 (1924). Put another way, "the non-breaching party 'should on no account get more than would have accrued if the contract had been performed.'" *White v. Delta Constr. Int'l, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002) (quoting *DPJ Co. v. FDIC*, 30 F.3d 247, 250 (1st Cir. 1994)). In order to recover lost profits for the government's breach of a contract, the non-breaching party "must establish by a preponderance of the evidence" the requirements for such an award. *Energy Capital Corp. v. United States*, 302 F.3d 1314, 1324-25 (Fed. Cir. 2002). "Lost profits are 'a recognized measure of damages where their loss is the proximate result of the breach and the fact that there would have been a profit is definitely established, and there is some basis on which a reasonable estimate of the amount of the profit can be made.'" *Cal. Fed. Bank v. United States*, 245 F.3d 1342, 1349 (Fed. Cir. 2001) (quoting *Neely v. United States*, 152 Ct. Cl. 137, 285 F.2d 438, 443 (Ct. Cl. 1961)).

Because the purpose of a damages award is to put the non-breaching party "in as good a position as [it] would have been in had the breaching party fully performed," *Wells Fargo Bank*, 88 F.3d at 1021, the logical starting point for a damages analysis is an understanding of the breaching party's obligations under the contract. As explained above, a requirements contract "calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart*, 967 F.2d at 581. Court of Claims and Federal Circuit cases that support the award of anticipatory profits for the breach of a requirements contract all involve situations in which the government failed to perform this obligation because it had "actual requirements for specified supplies and services" but, in one way or another, diverted that business away from the party with whom it had contracted.

In *Locke v. United States*, 151 Ct. Cl. 262, 283 F.2d 521 (Ct. Cl. 1960), the government contracted to list the plaintiff's typewriter repair company, along with three other companies, in a *Federal Supply Schedule*. 283 F.2d at 522. Various departments of the federal government were required to use the contractors whose names appeared on the schedule. In exchange for the government's listing of his company in the schedule, Locke's company "was obligated to perform all the services for which he contracted." 283 F.3d at 523. After several months of listing Locke's company, during which time the company received business from the government, the government terminated the contract and struck the company from the schedule. Locke sued for breach of contract, seeking damages in the form of lost profits. After the Board of

Review of the General Services Administration denied him relief, Locke filed suit in the Court of Claims.

In opposing Locke's breach claim, the government advanced essentially two arguments. First, it contended that since Locke's company had entered into a requirements contract, which did not guarantee that any minimum quantity of services would be ordered, Locke could not recover lost profits for providing services to which his company had no entitlement under the contract. Second, the government urged, it only agreed to list Locke's company, along with other typewriter-repair contractors. Because departments were free to choose any of the listed companies to perform the services at issue, the government's performance of the contract by continuing to list Locke's company did not guarantee the company any actual sales. The government contended that, under these circumstances, any award of lost profits was speculative and inappropriate. *Id.* The Court of Claims rejected the government's contentions. As for the first argument, the court stated:

> We agree that nothing in the contract would have prevented the Government from enlarging its own repair facilities to fill completely its needs. This would have left nothing to be awarded under the Federal Supply Schedule contracts. But the facts as alleged show that the Government did have some service requirements beyond its own capacity. Presumably, these requirements were awarded to contractors in the schedule. Plaintiff's chance of obtaining some of these awards, by being in the schedule and

> competing with the other contractors, had value in a business sense. The Government by its breach deprived plaintiff of this value.

283 F.2d at 524 (emphasis in original).

In rejecting the government's second argument--that an award of anticipatory profits would be speculative--the court pointed out that it appeared that Locke "did have a chance of obtaining at least one-fourth of the total typewriter repair business let by the Government." 283 F.2d at 525. The court therefore referred the case to the trial commissioner for further proceedings, directing the trial commissioner to determine: (1) the total amount of typewriter-repair business that was let by the government and for which Locke would have been eligible but for the government's breach; (2) whether any material facts would have tended to prevent Locke from receiving its proportionate share of the business that was available; (3) the average unit cost normally incurred in performing the kind of repair work involved under the contract; and (4) the expenses that Locke would have incurred in performing its obligations under the contract. *Id.* Thus, in Locke, the Court of Claims held that the contractor was entitled to recovery to the extent of (i) the amount of typewriter-repair business that existed that it would have obtained; and (ii) its ability to satisfy the requirements for the recovery of lost profits stated in California Federal Bank.

In *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982), the government entered into a requirements contract with Soledad Enterprises, Inc. ("Soledad") for grounds maintenance and refuse removal at six Navy family housing projects. However, upon recognizing

that it could procure the contract services from the Department of the Navy's Public Works, the government diverted its rodent pest control services away from Soledad, in breach of the requirements contract. 681 F.2d at 758. The Court of Claims rejected the government's argument that because Soledad did not perform any pest control services under the requirements contract, the contract had been constructively terminated for the convenience of the government. The court stated that the termination for convenience clause does not allow the government to divert business away from a contractor and breach its only meaningful obligation under a requirements contract. 681 F.2d at 771. Significantly, though the court left the question of damages for further proceedings, it made clear Soledad's entitlement was not to an "obligatory minimum" number of calls for pest control work, but to "all of the buyer's requirements." 681 F.2d at 761.

Finally, in *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000), we reaffirmed the availability of lost profits compensation when the government breaches a requirements contract by procuring goods or services from third party sources. In that case, the plaintiffs entered into requirements contracts with the General Services Administration ("GSA") for transcription and court reporting services for various federal agencies. Each contract included the standard requirements clause found in FAR § 52.216-21(c). That clause states that, "except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule." 48 C.F.R. § 52.216-21(c). However, none of the plaintiffs was assured

that any of the agencies would purchase its services. The government's sole obligation under the several contracts was to purchase from the pool comprised of the contracting plaintiffs all the transcription requirements of the listed agencies. It was stipulated that, during the period of the contracts, some of the agencies covered by the contracts contracted for transcription services with companies that were not parties to the GSA contracts. *Ace-Federal Reporters*, 226 F.3d at 1331. This was not permitted absent a waiver from GSA. *Id.* The plaintiffs filed claims with GSA's contracting officer, alleging that the off-schedule purchases by some agencies constituted a breach of contract. For the alleged breach, they sought to recover lost profits and consequential damages. After the contracting officer denied the claim and the GSA Board of Contract Appeals sustained the denial, the plaintiffs appealed to this court. Because we concluded that the Board had erred in holding that the terms of the contracts precluded recovery of lost profits damages, we reversed and remanded.

Recognizing that the contracts at issue were not typical requirement contracts and that they did not guarantee any of the individual contractors business, because the agencies were free to choose amongst the contractors for the provision of transcription services, we analogized to *Locke*. In both cases, the government asserted that the absence of any guarantee of obtaining work rendered lost profits too speculative to prove. Like the Court of Claims in *Locke*, we disagreed, holding that the government's promise to purchase transcription services only from the contractors on the schedule "had substantial business value because there were only between two and five authorized sources" for the services in each geographical region. *Id.* at 1332. We concluded that, under these

circumstances, by considering the total amount of transcription services the government purchased from third parties, along with other relevant factors, the court or the Board reasonably could determine the amount of actual business and profits that the plaintiffs lost as a result of the breach. *Id.* In other words, because the government's breach in *Ace-Federal* involved the diversion away from the non-breaching parties of actual business that they otherwise would have received (as in *Torncello* and *Locke*), the loss of profits was a "proximate result of the breach and . . . there [was] some basis on which a reasonable estimate of the amount of the profit [could] be made." *Cal. Fed. Bank*, 245 F.3d at 1349.

The combined teaching of *Locke, Torncello*, and *Ace-Federal* is that the government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery noted in *California Federal Bank*. The critical point is that the government's breach of its obligation "to fill all its actual requirements . . . by purchasing from the awardee," *Medart*, 967 F.2d at 581, has the effect of taking away from the contractor the opportunity to earn a profit.

This case, however, does not involve the kind of breach that occurred in *Locke, Torncello*, and *Ace-Federal*. DLA did not purchase from third parties the refrigerant cylinders that it was obligated, under the contract, to purchase from Applied. Thus, unlike the government in those cases, it did not divert from a requirements contractor business that

existed. To the contrary, it did purchase from Applied all of its actual requirements for refrigerant cylinders, although those requirements were far less than what had been estimated in the RFP. In short, the government performed the obligation that was breached in *Locke, Torncello*, and *Ace Federal*; it used Applied to satisfy all of its requirements.

The government's breach in this case was the inclusion of negligently prepared estimates in the RFP. For that breach, Applied is not entitled to recover the profits it would have made had DLA in fact had requirements to the extent of approximately 120,000 refrigerant cylinders. Allowing Applied to recover lost profits on the 120,000 estimated cylinders would effectively convert the contract at issue from one to satisfy all of DLA's requirements to one in which DLA guaranteed Applied a certain level of business. Contract estimates are "not guarantees or warranties of quantity," however. *Shader Contractors*, 276 F.2d at 7. No case has been cited to us in which, under a requirements contract, a contractor was allowed to recover anticipatory profits as damages for a breach of contract resulting from negligently prepared estimates.

In addition, in order to recover anticipatory profits, it must be "definitely established" that without the government's breach there would have been a profit. *Cal. Fed. Bank*, 245 F.3d at 1349. Applied cannot meet that requirement. Had DLA discharged its duty by properly preparing and propounding the cylinder estimates, or if it had told offerors that the estimates were inaccurate before contract award, Applied would not have expected to sell, and it would not have sold, 120,000 cylinders. In other words, the profit Applied attempts to recover in the form of lost profits for

anticipated sales would not "definitely" have existed but for DLA's breach.

Finally, awarding Applied damages in the form of lost profits would allow Applied to profit from DLA's breach. If DLA had furnished a reasonable estimate of its cylinder needs for the term of the contract, one of two things would have occurred: Either Applied would have submitted a bid and been awarded the contract, in which case it would have earned a profit (albeit possibly greater per unit than the one it actually earned) on the approximately 11,500 cylinders it sold; or Applied would have declined to bid on the contract, in which case it would have earned no profit. To the extent that it is allowed to recover a profit based upon the 120,000 units of cylinders included in DLA's negligently prepared estimates, Applied would find itself in a better pecuniary position than if DLA had never propounded the inflated estimates and breached the contract. As noted above, such a damages award would squarely conflict with the rule that a non-breaching party "should on no account get more than would have accrued if the contract had been performed." *Delta Constr. Int'l*, 285 F.3d at 1043.

In our view, *Everett Plywood v. United States*, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969), suggests the proper methodology for determining the recovery to which Applied is entitled by reason of DLA's breach. In that case, the plaintiff agreed to cut and purchase timber located in the Snoqualmie National Forest in the State of Washington. In its prospectus issued before award of the contract, the United States Forest Service estimated the total volume of timber in the specified area to be approximately 73,100 M board feet. 419 F.2d at 427. Though Everett Plywood's agreement to

purchase the timber from the Forest Service was not a requirements contract, the estimates of volume were material to the contract. The estimates were inaccurate, as the total volume of timber that Everett Plywood was able to cut and purchase under the contract was 46,081 M board feet, or approximately 27,000 fewer board feet than the Forest Service had estimated in the prospectus.

The Court of Claims calculated the damages resulting from the breach. The court pointed out that because of the Forest Service's inaccurate estimate, Everett Plywood cut less timber than it expected when bidding on the contract. Its per unit cutting costs therefore increased. Accordingly, Everett Plywood "suffered damages . . . as a reasonably foreseeable result of defendant's breach of warranty, by failing to realize the advantages of the lower average rates which would have resulted" from cutting a larger volume of timber. 419 F.2d at 433. The court therefore calculated "the average rate which plaintiff would have paid . . . had the contract volume . . . been realized." *Id.* Then, to compute the damages to which Everett Plywood was entitled, the court applied the difference between that rate, which Everett Plywood would have paid had the government's estimates been accurate, and the contract rate, for the volume actually cut, "to arrive at the excess payment . . . resulting from plaintiff's failure to realize the lower average rate contemplated." *Id.* In other words, Everett Plywood was entitled to compensation for the loss it incurred as a result of the Forest Service's faulty estimate, in the form of an adjustment to the contract price applied to the volume of timber actually cut under the contract.

Similarly, in *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506 (1993), the court stated:

"Where a contractor can show by preponderant evidence that estimates it relied on were negligently prepared or were unreasonably inadequate, indicating a lack of due care in their preparation at the time the estimates were made, the government may be liable for resulting damages." *Id.* at 520. The court further stated that, in such a situation, the contractor "is entitled to be paid the reasonable value of the work performed." *Id.* at 524. The court explained that paying the contractor the reasonable value of the work performed may involve increasing the contract price. This is because "when actual work performance produces a lower number of items, the cost allocation per work item [is] higher than was the bid price[,] which was based on a higher number of work items and an attendant lower cost allocation per item of work." *Id. See also In re Cactus Press/Power Enters., Inc.*, GPOBCA 20-99 (Jan. 31, 2001) (recognizing "the well-settled principle relating to 'requirements contracts' which holds that contractors who submit bids in reliance on negligently prepared and incorrect estimates of work in the solicitation are entitled to an equitable adjustment" (citations omitted)); *HKH Capitol Hotel Corp.*, ASBCA No. 47,575, 1998-1 B.C.A. (CCH) P 29548, at 146,472 (Jan. 26, 1998) ("Where the Government's estimate is negligently prepared and appellant reasonably relies upon that estimate to its financial detriment, the remedy is an equitable adjustment." (citation omitted)); John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 1205 (3d ed. 1998) (stating that relief for faulty government overestimates "has been measured by repricing the contract quantities based on an accurate estimate of the quantities of work. Such repricing places the contractor in the position it would have occupied but for the Government breach.").

In short, during the quantum proceedings which are to follow, Applied should have the opportunity to establish that it is entitled to an equitable adjustment in the price of the cylinders it delivered because it relied on DLA's negligent estimates and, as a result, suffered damages. We note that, in denying Applied's breach claim, DLA's contracting officer set forth such an approach. The contracting officer noted that "an equitable adjustment compensates for changes by paying a contractor its increased costs resulting from the change, plus an allowance for profit on that cost." See *United States v. Callahan Walker Constr. Co.*, 317 U.S. 56, 61, 87 L. Ed. 49, 63 S. Ct. 113, 96 Ct. Cl. 616 (1942) ("An 'equitable adjustment' . . . involved merely the ascertainment of the cost of [additional work] . . . and the addition to that cost of a reasonable and customary allowance for profit."); *Earth Burners, Inc. v. United States*, 43 Fed. Cl. 481, 482 (1999) (noting that "the proper measure of an equitable adjustment is reasonable costs, including reasonable profit for the work performed" (citation omitted)); *Gen. Ry. Signal Co.*, ENGBCA No. 6168, 1995 Eng. BCA LEXIS 24, 96-1 B.C.A. (CCH) P 27981, at 139,755 (Aug. 3, 1995) ("We conclude that the equitable adjustment for the switching machines should be measured by the contractor's reasonable cost plus an allowance for a fair and customary profit." (citation omitted)). We think the approach of an equitable adjustment properly assesses Applied's damages.[5]

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[5] The case on which the Board relied for the proposition that Applied's breach damages may include anticipatory profits, *Carchia*, 202 Ct. Cl. 723, 485 F.2d 622, is inapposite. In *Carchia*, the government wrongfully terminated a construction contract for default. At the time, a wrongful default termination was treated as a breach of contract. As the Court of Claims stated, "since this was

## CONCLUSION

For the foregoing reasons, the decision of the Board holding that DLA breached its requirements contract with Applied is affirmed. In the next phase of the case, consistent with this opinion, the Board will determine the amount of the recovery, if any, to which Applied is entitled by reason of DLA's breach.[6]

## COSTS

No costs.

AFFIRMED.

## DISSENT

DYK, Circuit Judge, concurring in part and dissenting in part.

In the present contract the government undertook two relevant obligations: (1) to purchase its actual requirements

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an old-style contract which did not provide that a wrongful default termination was to be considered a convenience-termination, plaintiff was entitled to anticipated profits for work not yet performed at the time it received the improper notice of default termination." 485 F.2d at 625. In *Carchia*, the government did not dispute entitlement to anticipated profits, only the amount of such profits.

[6] The Board will have to determine whether, as asserted by the contracting officer in her final decision, the termination settlement compensated Applied for DLA's breach.

from the plaintiff and (2) to accurately estimate its requirements. There was no breach of the first obligation, but the majority holds that the second obligation was breached because the government, either in bad faith or negligently, provided an incorrect estimate. I am in full agreement with the majority so far. Having found that the second obligation was breached, however, the majority unaccountably denies the plaintiff's claim for lost profits for the admitted breach. The measure of damages the majority uses is unsupported by our precedent and contrary to the general law of contracts. Moreover, it leaves the contractor largely uncompensated for the breach and provides almost no incentive for the government to avoid such breaches in the future. I respectfully dissent.

The majority cites no case in which there was a bad faith or negligent misrepresentation in a requirements contract but lost profits were denied. In *Everett Plywood & Door Corp. v. United States*, 190 Ct. Cl. 80, 419 F.2d 425 (Ct. Cl. 1969), *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506 (Fed. Cl. 1993), *Cactus Press/Power Enterprises, Inc.*, GPOBCA 20-99 (Bd. Contract App. Jan. 31, 2001), and *HKH Capitol Hotel Corp.*, ASBCA No. 47,575, 98-1 B.C.A. (CCH) P 29,548, at 146,467 (Jan. 26, 1998), cited by the majority as support for denying lost profits, *ante* at 20-22, the plaintiffs did not seek lost profits for a governmental misrepresentation. Thus, those opinions' silence as to the possibility of lost profits recovery for misrepresentation is completely without significance.

In *Everett Plywood* the plaintiff contracted with the Forest Service to purchase timber on a parcel of government land for a price that would decrease over time, so that the plaintiff

would pay less per unit for the timber the more timber it cut and purchased. 419 F.2d at 427. The government negligently misrepresented how much timber was on the parcel so that the plaintiff's average cost per unit was higher than it had contemplated. 419 F.2d at 429. The plaintiff sought a price adjustment, and our predecessor court awarded the difference between the per unit price the contractor had to pay for the timber it cut and the effective price per unit it would have paid for the timber if the contractor had been able to cut the quantity estimated by the *Forest Service*. 419 F.2d at 433. There is no indication that the plaintiff sought lost profits, and the opinion does not discuss or even mention a lost profits issue.

In none of the other cited cases involving negligent misrepresentation did the contractor seek lost profits. In *Crown Laundry*, the contractor sought only equitable adjustment of the contract, and the parties stipulated the actual dollar amount of damages at the outset were the contractor to prevail. 29 Fed. Cl. at 514. Likewise, in *Cactus Press*, the contractor sought only equitable adjustment of the contract price. The same is true of *HKH Capitol Hotel Corp*. 98-1 B.C.A. P 29,548 at 146,471. The equitable adjustment sought by the contractors in those cases appears to have consisted mainly of increased costs associated with the unexpected volume. But in *Crown Laundry* the amount of damages was not disputed, and in neither *Cactus Press* nor *HKH Capitol Hotel Corp* did the Board find that the contractor was entitled to an equitable adjustment.[1] Those cases therefore did not

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[1] In *Cactus Press*, the Board rejected the contractor's claim because it was untimely. In *HKH Capitol Hotel Corp*., the

reach the question of what measure should be used. The statements in each case that equitable adjustment of the contract price was available to the contractor (if it could establish that it was harmed by a negligently prepared bid) simply restated the claim asserted by the contractor. Those statements were not addressed to lost profits and have no bearing on lost profit recovery.[2]

Without a controlling precedent, this court "applies ordinary principles of contract construction and breach." *United States v. Winstar Corp.*, 518 U.S. 839, 871, 135 L. Ed. 2d 964, 116 S. Ct. 2432 (1996) (plurality opinion); accord *Lynch v. United States*, 292 U.S. 571, 579, 78 L. Ed. 1434, 54 S. Ct. 840 (1934) ("rights and duties" of government contract "are governed generally by the law applicable to contracts between private individuals."). The majority must recognize that there is no controlling precedent in this area, as it observes that "no case has been cited to us in which, under a requirements contract, a contractor was allowed to recover anticipatory profits as damages for a breach of contract resulting from negligently prepared

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contractor's claim was barred because the contractor did not seek clarification of a patent ambiguity in the contract relating to the estimate. 98-1 B.C.A. P 29,548 at 146,472

[2] Equally inapplicable, so far as computation of damages is concerned, are the diversion cases, when lost profits recovery is allowed because the government has improperly diverted orders to other sellers. *Ante* at 13-18 (discussing *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2000); *Torncello v. United* States, 231 Ct. Cl. 20, 681 F.2d 756 (Ct. Cl. 1982); *Locke v. United States*, 151 Ct. Cl. 262, 283 F.2d 521 (Ct. Cl. 1960)).

estimates," *ante* at 19, and then it cites no case in which, in that situation, lost profits have been denied. Accordingly, we must look to the general law of contracts.

As the majority recognizes, the rule in this area is that lost profits are available to the non-breaching party, assuming foreseeability. As we have said,

> "One way the law makes the non-breaching party whole is to give him the benefits he expected to receive had the breach not occurred." *Glendale Federal Bank FSB v. United States*, 239 F.3d 1374, 1380 (Fed. Cir. 2001) (citing Restatement (Second) of Contracts § 344(a)(1981)). A party's expectation interest is the "interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." Restatement (Second) of Contracts § 344(a)(1981). *Expectation damages are recoverable provided they are actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty. Bluebonnet Sav. Bank, F.S.B. v. United States*, 266 F.3d 1348, 1355 (Fed. Cir. 2001) (emphasis added). The leading authorities on contract agree that the normal measure of damages includes lost profits. As it was put in the First Restatement of Contracts, "compensatory damages will be given for the net amount of the losses caused and gains prevented, in excess of savings made

> possible." Restatement (First) of Contracts § 329 cmt. a (1932). See also Arthur Linton Corbin, *Corbin on Contracts* § 992 (Interim ed. 2002) (quoting First Restatement with approval); Restatement (Second) of Contracts § 347 (1981).

To determine how to calculate the gains prevented by Defense Logistics Agency's ("DLA") breach, we should look to breach of warranty cases. If DLA had warranted to Applied Companies, Inc. ("Applied) that the requirements contract would provide 120,000 cylinders' worth of work, damages would be awarded to compensate the contractor for the benefit of the expected bargain, not for the value of the contract as it was without the misrepresentation. For example, the Uniform Commercial Code provides, "The measure of damages for breach off warranty is the difference . . . between the value of the goods accepted and the value they would have had if they had been as warranted." UCC § 2-714(2) (1989). This is in keeping with the rule that "ordinarily, the damages recoverable for a breach of contract are measured on the basis of the value of the *promised performance*." Corbin, *supra*, § 1030 (emphasis added).

To be sure, in this case there was, in effect, only a warranty that the requirements were properly estimated; the quantity ordered could have been higher or lower. But such uncertainty, contrary to the majority's assertion, does not bar recovery. Although we have not specifically addressed the lost profits issue, we have repeatedly recognized that when the government allows bidding on either requirements or indefinite quantities contracts, it is reasonable and foreseeable for contractors to rely on government estimates. *Medart, Inc.*

*v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992) ("Presumably contractors rely on the [government's] proffered estimates in formulating their bids, so the government must act in good faith and use reasonable care in computing its estimated needs"); *Clearwater Forest Indus., Inc. v. United States*, 227 Ct. Cl. 386, 650 F.2d 233, 239 (Ct. Cl. 1981) ("[A] prospective purchaser should reasonably be expected to base his operating plans and cost estimates on [government estimates]"); *Womack v. United States*, 182 Ct. Cl. 399, 389 F.2d 793, 801 (Ct. Cl. 1968) ("Assuming that the bidder acts reasonably, he is entitled to rely on Government estimates as representing honest and informed conclusions."). Indeed, it is the very purpose of quantity estimates to induce such reliance; otherwise, as our predecessor court said, the estimate would be "surplusage at best or deception at worst." *Womack*, 389 F.2d at 801.

Where such reliance is reasonable, "if a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery." *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329, 1333 (Fed. Cir. 2000) (quoting *Locke v. United States*, 151 Ct. Cl. 262, 283 F.2d 521, 524 (Ct. Cl. 1960)). In circumstances in which the breach destroyed all value and made recovery under the contract impossible, courts have measured the value of the contract right at the time of the breach. Corbin, *supra*, § 1030; E. Allen Farnsworth, *Farnsworth on Contracts* § 12.15 (2d ed. 1998). So too, at the time the government made the contract with Applied, it was worth something definite, of which the government's estimate was highly probative. Alternatively, recovery could be based on other evidence of the contract value -- how Applied valued the contract when it was signed, for example, or how other, similarly situated

companies valued requirements contracts. See Farnsworth, *supra*, § 12.15. Taking into account expected variations from the estimate, the Board should award lost profits based on the amount of likely purchases given the estimate. It is particularly inappropriate for the majority to foreclose lost profit damages at this stage, before Applied has even had the opportunity to present evidence on the matter.

The majority holds that an award of lost profits would overcompensate Applied because, had the government disclosed its actual requirements, Applied would have either "submitted a bid" on the contract as it was or "declined to bid on the contract and thus made no profit at all." *Ante* at 19. In short, the majority contends, it would have been impossible for Applied to recover the profits on this contract, because even absent the breach, Applied "would not have expected to sell, and it would not have sold, 120,000 cylinders." *Ante* at 18. But that characterization removes the misrepresentation from the measure of damages, as if it had never happened. The famous Bristol Seed case, treated by Corbin, provides an illustration of the majority's approach. *Corbin, supra*, § 1026 (describing *White v. Miller*, 71 N.Y. 118 (N.Y. 1877)). In that case, the buyer purchased seed from a seller who warranted that it was fit for human consumption. It was in fact mixed seed only good for animal feed. The buyer was due damages based on the difference between the value of the seed as warranted and the value of the actual seed, including lost profits. *Id.* Under the majority's theory of damages, however, the buyer could not recover expected profits because there would not have been any; the seed was unfit for human consumption.

Here the contractor assumed the risk that the government's requirements would actually be less than the estimate; the contractor did not assume the risk that the government's requirements estimate would be deliberately or negligently misstated. The majority's measure of damages thus effectively erases the breach. Far from "converting the contract . . . to one in which DLA guaranteed Applied a certain level of business," as the majority asserts, *ante* at 19, awarding lost profits merely reflects the general measure of damages.

The consequence of today's decision is that the government may misrepresent its requirements with impunity so long as the contractor suffers no increase in costs. That seems to me to be bad policy as well as bad law. I respectfully dissent.

318 F.3d 1317

## APPENDIX D

## ARMED SERVICES BOARD OF CONTRACT APPEALS

**[¶ 31,325]**

**ASBCA Nos. 50749, 50896, 51662**

**Under Contract No. SPO450-94-D-0108**

**[Dated February 26, 2001]**

**Indefinite Delivery Contracts – Estimates by Government – Negligent Preparation.** – A government's motion for summary judgment on a claim for termination settlement costs and lost profits was denied because the government knew before the contract was awarded that it had significantly overestimated the quantity of refrigerant cylinders it would need, did not modify the estimate before award, and breached the contract by not ordering the minimum quantity. In addition, the board rejected the government's argument that the claim should be dismissed because the contractor stated in its bid that its profit margin was zero, explaining that the subcontractor entered into a post-award agreement with a supplier that lowered its costs and made the contract profitable.

**Options – Nonexercise – Right Not to Exercise.** – A contractor's claim for anticipatory profits for a contract option year that was not exercised was dismissed because the option was a unilateral right that the government was free to decline.

For the appellant: Peter B. Jones, Esq. Jones & Donovan, Irvine, California. For the government: Donald S. Tracy, Esq. Chief Trial Attorney Defense Supply Center Richmond (DLA) Richmond, Virginia.

Before DICUS, STEMP:ER, and THOMAS, Administrative Judges.

DICUS, Administrative Judge: ASBCA No. 50749 is taken from a contracting officer's unilateral determination awarding termination settlement costs and profit. ASBCA No. 51662 is taken from a contracting officer's decision denying appellant's claim of $1,025,812.80 for anticipatory profits.[1] ASBCA No. 50896 is taken from the deemed denial of appellant's claim of $967,909.50 for anticipatory profits in the option year of the contract. The parties have filed cross motions for summary judgment in all three appeals.[2] We grant

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[1] ASBCA No. 51662 is a protective appeal filed because the Government had moved to dismiss ASBCA No. 50749. The parties agreed that the substance of the appeals is identical and a decision in either appeal resolves both. The jurisdictional issue raised by the Government thus affects only interest. The parties agreed to defer the issue until the quantum phase.

[2] With its cross-motion, the Government has submitted Proposed Findings of Fact (Govt. PFF). The PFF are supported by 97 exhibits submitted by the Government, some of which are duplicated in the Rule 4 file. Appellant's motion also includes proposed findings of fact (app. PFF). Appellant's response to the Government's cross-motion included a "Statement of Genuine Issues and Objections to Respondent's Statement of Uncontroverted Facts" (Statement and Objections) in which appellant responded to each of the Government's proposed findings. We have based many

appellant's motion in ASBCA Nos. 50749 and 51662. We grant the Government's motion in ASBCA No. 50896.

## *FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS*

### *General Findings of Fact Applicable to all Appeals*

### *The RFP and Development of the Estimates*

1. This appeal concerns a contract for the purchase of cylinders to store R-12 and R-114 refrigerants, identified as "Class I Ozone Depleting Substances (ODSs)." The National Defense Authorization Act for Fiscal Year 1993, Public Law 102-484, § 325 (Oct. 23, 1992), required the Defense Logistics Agency (DLA or Government) to build and maintain a stockpile or reserve (reserve) of all ODSs sufficient to ensure their availability for mission critical uses by all military departments and Defense agencies beyond 1995. DLA was directed to assess the amount of Class I ODSs in all military and Defense agency inventories, the amount that would be used by all such entities from 1992 to 1995, the amount that could be recycled, and the amount needed beyond 1995 for mission critical uses. (Govt. PFF 5)

2. DLA established the ODS Reserve Program Office (ODSRPO) to manage, build and maintain the reserve (Govt. PFF 6).

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of our findings on the proposed findings of one or both parties where there is no dispute. In a few instances we have based our findings on the Government's proposed findings where appellant's objection is on the basis of relevancy.

3. By June of 1993, ODSRPO had informed the Defense General Supply Center (DGSC),[3] the DLA entity responsible for acquisition of R-12 and R-114, that the military services and Defense agencies had only been able to provide "ballpark" reserve estimates of about three million pounds for both R-12 and R-114. However, it had not been determined what size or sizes of cylinders would be needed for storing this quantity of refrigerants. The Government contemplated first purchasing all cylinders, then furnishing them as Government-furnished property in follow-on contracts for the refrigerants themselves. (Govt. PFF 7)

4. Using the "ballpark" reserve estimates, the item manager attempted to compute the number of cylinders of each size needed for the reserve. The cylinders used for storing R-12 and R-114 come in three sizes. The item manager decided to compute cylinder size estimates by assuming that each cylinder size would be used to store the entire "ballpark" estimate. The result was that the RFP's estimated quantities for the purchase of cylinders were triple the actual storage capacity needed to accommodate the "ballpark" estimate for R-12 and R-114. (Govt. PFF 7-8; app. PFF 5-7)

5. DGSC issued Request for Proposals (RFP) SPO412-93-R-2670 on 14 July 1993, with an 13 August 1993 closing date. The resultant contract was to have a 12-month basic ordering period, with one option year. The RFP requested

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[3] DGSC is now named the Defense Supply Center Richmond (DSCR). For continuity, we continue to refer to it as DGSC.

proposals for a requirements contract for compressed gas cylinders of 42, 122, and 1000 pounds water capacity to be used for R-12 and R-114 storage. At issue are the 42 lb. water-capacity cylinders at line items 0001 and 0004. Deliveries were required not less than 30 days (FOB origin) after mailing or otherwise furnishing the delivery order to the contractor. Three amendments were issued prior to the request for Best and Final Offers (BAFOs) which, among other items, changed the delivery requirement to 75 days. (50749 R4, tab 1; complaint)

6. The item manager's estimates were forwarded to the contracting officer, who incorporated them as annual estimates in the RFP. The RFP thus provided the following information in Section B for line items 0001 and 0004:

*[EST. ANNUAL QUAN.]*

0001 . . . . . 62,945 EA

MIN QTY PER DELIVERY ORDER: . . . . . 6295 EA

MAX QTY PER DELIVERY ORDER: . . . . . 25,178 EA
. . . .

0004 . . . . . 56,550 EA

MIN QTY PER DELIVERY ORDER: . . . . . 5655 EA

MAX QTY PER DELIVERY ORDER: . . . . . 22,620 EA

(50749 R4, tab 1) The RFP further specified that the variation in quantity would be "plus 03% minus 03%." The

estimated quantities were the same for the option year. (50749 R4, tab 1 at 5, 7)

7. The contract required that the cylinders contain valves manufactured by Superior Valve Company, later amended to include Ceodeux Co. as a source (Gov't PFF 3; 50749 R4, tab 1).

8. The RFP incorporated in full text the following standard clauses: Federal Acquisition Regulation (FAR) 52.216-18 ORDERING (APR 1984), FAR 52.216-19 DELIVERY-ORDER [sic] LIMITATIONS (APR 1984), and 52.216-21 REQUIREMENTS (APR 1984) and 52.233-1, DISPUTES (DEC 1991). The RFP also provided a notice stating as follows:

> The quantity shown in the schedule is an estimated annual quantity. The Government has attempted to provide its best estimates based on past and anticipated purchasing patterns.
> (50749 R4, tab 1)

9. On or about 11 August 1993, Applied Companies, Inc. (Applied or appellant) submitted a proposal of $52.60 per unit for line item 0001 and $52.60 per unit for line item 0004, for the base and option years. In its proposal, appellant represented that it was a manufacturer of the cylinders and checked the appropriate block of the Walsh-Healey Public Contracts Act representation. Appellant further represented that it intended to perform the contract at its plant in San Fernando, California. (Gov't PFF 10)

10. Commencing in September 1993, the Government performed a pre-award survey. The survey documents indicate appellant's intention to manufacture the cylinders itself. (50749 R4, tab 10)

11. In December 1993, the ODSRPO had begun to receive more realistic estimates for reserve requirements. In early 1994, DLA instructed DGSC that the ODS Reserve requirements were being audited by the Navy (the primary user of many ODSs to be placed in the reserve) and the Air Force, and to forbear awarding contracts for the entire estimated refrigerant requirements until completion of the audits. (Gov't PFF 17-18) By January 1994, the ODSRPO and the DGSC Item Manager, contract specialist and contracting officer were each aware that the estimated quantities in the RFP were faulty. (Admission 14)

12. In March 1994, the ODSRPO informed the DGSC Item Manager that DGSC would purchase 25% of the 2.9 million lbs. of R-12 and 1.3 million lbs.[4] of R-114 quantities for the reserve. The Item Manager was told on 14 March 1994 that, for fiscal year 1994, the reserve required purchase of 42 lb. cylinders as follows: 2,555 for R-12 and 1,037 for R-114. (Gov't PFF 20-21)

*Contract Award and Performance*

13. On 20 June 1994, after discussions, receipt of BAFOs, and without adjusting the RFP's estimated quantities, the

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[4] The actual weight of required R-114 was 1,353,289 lbs. (PFF 21)

Government issued a notice of award of line items 0001 and 0004 to appellant, at the price of $52.60 per unit for each line item. The contract was effective 20 June 1994 through 14 June 1995. (Gov't PFF 24-25; R4, tab 1; Govt. ex. 16).

14. By FAX dated 30 June 1994, Manchester Tank & Equipment Co. (Manchester) submitted a proposal to appellant for the purchase of 42 lb. cylinders at a unit price of $43.05, based on annual quantities of 100,000. Appellant and Manchester exchanged correspondence concerning the terms and conditions of such purchase throughout the summer of 1994. There is a dispute of fact as to when appellant and Manchester came to terms on the delivery order quantity and whether there was a contract for the remainder of the base year. (Gov't exs. 18-32, 34-36; app. supp. br. at 3; Gov't supp. br. at 5)

15. The contracting officer issued Delivery Order No. 0001 (DO 0001) to appellant on 16 August 1994, requiring 5,411 R-12 cylinders and 4,933 R-114 cylinders (for a total of 10,344 cylinders), with 90 day delivery, or by 15 November 1994. The parties subsequently increased the amounts ordered in (bilateral) Modification No. 000101 to DO 0001, increasing the quantities to equal the minimum line item quantities stated in the contract (6,295 for line item 0001 and 5,655 for line item 0004) for a total of 11,950 units. (Gov't PFF 43, 55; Gov't ex. 48)

*Reduction of the estimated quantities*

16. By letter dated 29 August 1994, the Government notified appellant as follows:

> [T]he Government has discovered that a significant mistake was made in calculating the estimates. Therefore, the Government has recalculated the requirements as follows:

| *LINE ITEM* . . . | *[EST ANN. QTY]* |
|---|---|
| 0001 . . . . . | 5952 |
| MIN QTY PER [DO] . . . . . | 1488 |
| MAX QTY PER [DO] . . . . . | 5952 |
| [0004] . . . . . | 5426 |
| MIN QTY PER [DO] . . . . . | 1357 |
| MAX QTY PER [DO] . . . . . | 5426 |

The Government requested comments by 6 September 1994, and stated its intention to issue a modification that reflected the adjustments upon receipt of the comments. (50749 R4, tab 13)

17. By letter dated 29 August 1994, appellant advised Manchester of the change in estimated and minimum and maximum quantities for each line item. Manchester increased its quote on 6 and 12 September 1994 to $46.48 per unit, contingent on the use of Ceodeux valves at $14.85, if supplied by Manchester, for a total price of $61.33. (Gov't exs. 43, 45, 46)

18. By letter dated 13 September 1994, supplemented on 26 September 1994, appellant submitted a revised price of $2,060,743.13, a total based on an increase in unit price from

$52.60 to $126.98, plus $615,945 in "under absorbed indirect costs" based on a modified Eichleay calculation. Appellant submitted with its letter a new unit cost breakdown sheet indicating per unit material costs of $61.33, which sum equaled Manchester's attached price quotations. (Gov't PFF 53, 56, 58; Gov't exs. 44, 52)

19. The Government approved Sherwood as an additional valve supplier on 23 September 1994 (Gov't PFF 57). Bilateral Modification No. 000103, dated 18 October 1994, extended the delivery date from 15 November 1994 to 15 December 1994. (Gov't PFF 68)

20. Manchester advised appellant that delivery of the cylinders would not be before early 1995. (Gov't exs. 66-68, 70-75) By letter dated 17 November 1994, appellant requested that the Government extend DO 0001's delivery schedule to 30 January 1995. (Gov't PFF 69; Gov't ex. 66) By letter of 9 December 1994 appellant committed to delivery of cylinders at the rate of 2,000 per week commencing 27 January 1995 and offered consideration of $1,600 (50896 R4, tab 45).

21. When delivery was not made on 15 December 1994, the Government issued a 21 December 1994 show cause letter to appellant. The letter asked appellant to explain within 10 days why the contract should not be terminated for default for failure to deliver on 15 December 1994. (50896 R4, tab 46) Appellant responded in a 27 December 1994 letter in which, *inter alia,* it restated its commitment to complete the contract and make delivery by 27 January. Enclosed with the letter was a copy of its 3 October 1994 order to Manchester for the cylinders ordered by the Government in DO 0001. (50896 R4, tab 47) In a 6 January 1995 letter appellant stated it was

continuing with performance and continued to incur costs. The letter further states "[i]n order to minimize damages in the event of the government's termination of this contract, it is requested that DGSC advise us post haste as to its intentions to proceed forward or terminate this contract." (50896 R4, tab 48) By letter dated 9 January 1995 the Government agreed to continue the contract if the 27 January 1995 delivery schedule was firm and the parties could agree on a price adjustment (50896 R4, tab 49). On 12 January 1995, the Government proposed an equitable adjustment to $79 per unit to resolve appellant's request for equitable adjustment (Gov't ex. 85).

22. Appellant certified its 13 September 1994 request for equitable adjustment by letter dated 23 January 1995 (50749 R4, tab 16).

23. There is no evidence as to when appellant learned that the Government awarded the contract knowing of the faulty estimate.

24. The contract was terminated for convenience by letter of 6 February 1995 (Gov't ex. 87). By letter dated 22 February 1995, the Government stated it would take no further action on appellant's 13 September 1994 claim, and requested that appellant submit a termination settlement proposal under which the claim would be resolved. (Gov't ex. 88)

25. By submission dated 23 February 1995, appellant submitted its termination settlement proposal in the amount of $1,654,495. The proposal included under absorbed overhead of $1,115,509. (Gov't PFF 87)

26. By letter dated 5 June 1996, appellant submitted a final revised settlement proposal, increasing the amount claimed to $1,791,499 (50749 R4, tab 65). An interim revision dated 10 May 1995 is not a part of the file (50749 R4, tab 30).

27. By unilateral determination dated 26 February 1997, the Government settled the termination settlement proposal for $295,253.00 as follows:

| *COST CATEGORY ALLOWED* | *AMOUNT DETERMINED* |
|---|---|
| a. Work-in-Process | $211,458.00 |
| Note: This is the full Audit computed value IAW previously provided data | |
| b. Profit | 31,718.00 |
| Note: This amount is determined to be commensurate with the contract risk and effort performed under this contract. | |
| c. Subtotal | $243,176.00 |
| d. Settlement Expense | 3,000.00 |
| e. Settlements with Subcontractors | $49,077.00 |
| Subtotal | $295,253.00 |
| f. Less Prior Payments | |
| Jan. 1996 | (65,818.00) |
| Feb. 1997 | (163,617.00) |
| Jan. 1997 Invoice in Process | 65,818.00 |
| Balance due: | -- 0 -- |

The unilateral determination specifically denied appellant's claim of under absorbed overhead. (Gov't PFF 87; 50749 R4, tab 9)

*ASBCA No. 50749*

28. Appellant filed a timely appeal from the unilateral determination, which we docketed as ASBCA No. 50749. In its complaint, appellant alleged that the Government was negligent in computing the original estimates and that the Government's negligence constituted a breach of contract, entitling appellant to anticipated profits. Appellant alleged it had entered into agreements with suppliers to manufacture cylinders at a cost of $43.75 per unit, leaving in its unit price $8.85 in profit (the difference between $43.75 and appellant's bid price of $52.60). Appellant multiplied $8.85 by the originally estimated quantities for a total of $1,057,530, subtracted the Termination Contracting Officer's calculation of $31,718 profit, for alleged total damages of $1,025,812.80.[5] (Complaint)

*ASBCA No. 51662*

29. The Government filed a motion to dismiss ASBCA No. 50749 based on lack of jurisdiction over the breach claim. The motion asserted that appellant had never raised breach of contract or anticipatory profits. (5 August 1997 motion) There is no evidence that appellant reserved the right to claim breach damages during performance of the contract. After an 11 March 1998 telephone conference with the

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[5] Appellant's calculations are off by $.10.

Government and the Board, appellant agreed to submit a breach of contract claim for $1,025,812.80 to the contracting officer in order to render moot (except as to interest) the jurisdictional issue (11 March 1998 memorandum of Telephone Conference Call). Appellant submitted the breach claim on 12 June 1998. The claim seeks anticipatory profits of $1,025,812.80 and is properly certified (Gov't ex. 95).

30. By letter dated 12 June 1998, the contracting officer issued a final decision denying the breach claim. The contracting officer admitted that the Government failed to exercise due care in the preparation of the estimates because the estimates were not based on all of the knowledge existing at the time of award. (Gov't ex. 96) Appellant's appeal therefrom was docketed as ASBCA No. 51662.

*ASBCA No. 50896*

31. By letter dated 14 May 1997, appellant submitted a claim to the contracting officer in the amount of $967,909.50 for appellant's anticipated profit if the Government had exercised its option to extend the contract period for an additional year. Appellant's appeal from the contracting officer's failure to issue a final decision was docketed as ASBCA No. 50896. In its complaint, appellant alleged that the Government's negligent estimate of its annual quantity was a breach of contract. It alleged that the Government's failure to exercise the option for the second year, and to order the estimated quantity of cylinders for that year, was the natural, probable, and foreseeable consequence of the Government's negligent quantity estimate. (PFF 88)

*Additional General Findings*

32. Appellant's initial offer included a completed SF 1411 which indicated that its unit price included zero profit and included a statement that the "[r]ates quoted are done . . . in order to secure the business. This will be the foundation of future commercial business in this product." (PFF 11) There is no evidence that appellant modified its profit position during subsequent extensions of the opening date or negotiations.

33. Appellant has submitted the declaration of Kent L. Fortin, appellant's Chief Financial Officer. He participated in the formulation of the bid. He stated that appellant relied on the estimated amounts (approximately 10,000 per month) stated in the solicitation, and that its bid prices were based on anticipated high-volume production, economies of scale, and amortization of initial, preparatory unbalanced manufacturing costs on a per unit basis over the estimated annual quantities for the base year and option year. Mr. Fortin also stated that the price for the cylinders was less than one half of the price that would have been offered if the Government's estimated annual quantities had been 12,000 cylinders. (App. br., Ex. B)

*PRELIMINARY MATTERS*

*Appellant's Objections to the Government's 97 exhibits and PFF*

Appellant generally objects to the Board's consideration of the Government's 97 exhibits since "they have not been tendered in accordance with established procedures"

(Statement and Objections at 2). Appellant did not further specify the basis for its objection. We deny the objection.

Of the remaining exhibits, appellant further objects on relevancy grounds to those that comprise copies of its own correspondence with subcontractors concerning pricing of the cylinders to be supplied by the subcontractor, which we conclude were exhibits 18-32, 34-36, 43, 45-46, 53-54, 56, 58, 62-63, 66-68, 70-76, 79-80. We have found many of the exhibits relevant and, to the extent we have cited to them, we deny appellant's objections. Appellant also objects to many of the PFF on the basis that they are not relevant, or not relevant for the purpose of resolving these motions (*see* Statement and Objections to PFF 11-13, 15, 26-42, 44-46, 49, 51-52, 54-56,58-65, 67-85). We deny the objections and have made findings of fact utilizing those PFF.

## DECISION

Summary judgment is appropriate under FED. R. CIV. P. 56, which we look to for guidance, where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States,* 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Inferences must be drawn in favor of the party opposing summary judgment. *Hughes Aircraft Co.,* ASBCA No. 30144, 90-2 BCA ¶ 22,847. In deciding a motion for summary judgment, we are not to resolve factual disputes, but to ascertain whether material disputes of fact are present. *General Dynamics Corp.,* ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851. This principle also applies in the case of

cross-motions for summary judgment. *Town of Port Deposit v. United States,* 21 Cl. Ct. 204, 208 (1990). However, on cross-motions "counsel are deemed to represent that all relevant facts are before the [Board] and a trial is unnecessary." *Aydin Corp. v. United States,* 669 F.2d 681, 689 (Ct. Cl. 1982).

Evidence sufficient to establish the existence of a genuine material factual issue need not be in a form that would be admissible at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). However, more than mere assertions of counsel are necessary to counter a motion for summary judgment. *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,* 739 F.2d 624 (Fed. Cir. 1984). The nonmovant may not rest on its conclusory pleadings, but must set out, in affidavit or otherwise, what specific evidence could be offered at trial. Failing to do so may result in the motion being granted. Mere conclusory assertions do not raise a genuine issue of fact. (*Id.*) The party with the burden of proof must support its position with "more than a scintilla of evidence." *Walker v. American Motorists Insurance Co.,* 529 F.2d 1163, 1165 (5th Cir. 1976).

*The Government's Motion -*
*ASBCA Nos. 50749 and 51662*

The Government argues that the overestimate by the Government was not a breach. It also argues that, because appellant's proposal was on a "no profit" basis, appellant has not met its burden to show that it incurred any damage in the form of lost profits. Appellant responds that it suffered a breach and that it has met the *prima facie* showing of damages necessary for the entitlement phase of these appeals. As we find in addressing appellant's motion in ASBCA Nos. 50749

and 51662 that the Government breached the contract and that appellant has made a *prima facie* showing of damages, the Government's motion is denied.

*Appellant's Motion - ASBCA Nos. 50749 and 51662*

It is not disputed that the Government knew it would actually need about one-tenth of the quantities in the solicitation. It did not exercise reasonable care when that knowledge, acquired well in advance of contract award, was not factored into the contract estimates. The Government was, therefore, negligent, and appellant is entitled to compensatory damages for breach of the contract. *Womack v. United States*, 389 F.2d 793, 800 (Ct. Cl. 1968). Breach damages may include anticipatory profits. *Carchia v. United States,* 485 F.2d 622, 625 (Ct. Cl. 1973).

While we are considering appellant's entitlement to damages only in this phase of the appeals, and not quantum, there must be some evidence of damage. *See, e.g., Cosmo Construction Co. v. United States,* 451 F.2d 602, 605-06 (Ct. Cl. 1971) ("Evidence on damages or quantum is not totally excluded [from the merits phase of the proceeding], because there must be *some* evidence of damage to support a finding on liability. . . . [I]t is only sufficient to demonstrate that the issue of liability is not purely academic; that some damage has been incurred.")

Appellant has submitted evidence of a post-award arrangement with Manchester which, in effect, lowered its cost of performance and would thereby have made the contract profitable. Although the Government disputes this, we conclude that appellant has made a showing "sufficient to

demonstrate that the issue of liability is not purely academic." *Id.* We grant appellant's motion and sustain ASBCA Nos. 50749 and 51662, with the understanding that one of the appeals will be dismissed during the quantum phase after an agreement is reached or a determination is made as to the date when interest begins.

*ASBCA No. 50896*

Appellant seeks anticipatory profits for the option year. Appellant does not dispute that the option was never exercised (app. reply at 9). We agree with the Government's contention that an option is a unilateral right which the Government is free not to exercise. *Government Systems Advisors, Inc. v. United States,* 847 F.2d 811 (Fed. Cir. 1988). We grant the Government's motion with respect to ASBCA No. 50896.

**SUMMARY**

We grant appellant's motion in ASBCA Nos. 50749 and 51662 and sustain those appeals. We grant the Government's motion in ASBCA No. 50896 and deny that appeal.

**ARMED SERVICES BOARD OF CONTRACT APPEALS**

**[¶ 31,430]**

**ASBCA Nos. 50749, 51662**

**Under Contract No. SPO450-94-D-0108**

**[Dated May 21, 2001]**

**Indefinite Delivery Contracts – Estimates by Government – Negligent Preparation.** – On reconsideration, the a board of contract appeals affirmed its decision that a contracting officer's award of an indefinite quantity contract on the basis of inaccurate and negligently prepared quantity estimates was a breach, because the contracting officer had an affirmative duty to disclose accurate estimates before award. The CO knew that quantity estimates were inaccurate in advance of award.

**Indefinite Delivery Contracts – Estimates by Government – Damages.** – On reconsideration, a board of contract appeals affirmed its decision that a contracting officer's award of an indefinite quantity contract on the basis of inaccurate and negligently prepared quantity estimates was a total breach entitling the contractor to anticipatory profits because the government's denial of any contractual obligation created by the estimates reduced the value of the contract by ninety percent. Although this denial could be viewed as either a repudiation following a breach or a repudiation not associated with a breach, it was in either case a total breach, entitling the contractor to damages that would make it whole.

For the appellant: Peter B. Jones, Esq., Jones & Donovan, Irvine, California. For the government: Donald S. Tracy, Esq., Chief Trial Attorney, Defense Supply Center Richmond (DLA), Richmond, Virginia.

Before DICUS, STEMPLER, and THOMAS, Administrative Judges.

Denying reconsideration (00-1 BCA ¶ 31,325)

DICUS, Administrative Judge: Respondent has moved for reconsideration of our decision in these appeals. In *Applied Companies, Inc.*, ASBCA Nos. 50749, 50896, 51662, 01-1 BCA ¶ 31,324, we found it undisputed that respondent had been negligent in the preparation of estimates and awarded the contract knowing that the estimates were significantly inflated. We held that this constituted a breach of the contract by respondent and granted appellant's summary judgment motion in ASBCA Nos. 50749 and 51662. We granted respondent's cross-motion in ASBCA No. 50896, which sought damages for option years. Respondent argues that the Board erred as a matter of law in holding that a contract breach occurred when respondent awarded the contract knowing that its quantity estimates were negligently prepared. According to respondent, this was a misrepresentation and, as such, inadequate to support a finding of breach. Respondent does not argue that any of our findings of undisputed facts was in error. Familiarity with our decision is presumed.

We found that the contracting officer was aware of the negligent estimates by January 1994, that the contract was nonetheless awarded on 20 June 1994, that the first delivery order was issued on 16 August 1994, and on 29 August 1994

respondent informed appellant of the error in the estimates (findings 11, 13, 15, 16). The disparity exceeded 90 percent (findings 6, 12). However, according to respondent:

> The act of awarding a requirements contract with erroneous estimates is not a breach of contract. A breach of contract occurs when a party fails to perform a duty owed under a contract.
>
> (Motion at 2)

The timing of events and the state of the contracting officer's knowledge at critical times amply demonstrate that the contracting officer knew of the disparity well in advance of award and issuance of the first delivery order but took no action until after award and issuance of that delivery order. We think the contracting officer had an affirmative duty to disclose the accurate estimates before award. The contracting officer could not, with impunity, withhold that information, which was vital to pricing the deliverable items. *Womack v. United States,* 389 F.2d 793, 800 (Ct. Cl. 1968) (a material misrepresentation amounting to breach found where estimates used in the IFB were negligently prepared); *Snyder-Lynch Motors, Inc. v. United States,* 292 F.2d 907, 910 (Ct. Cl. 1961) (withholding information that the cost of parts would greatly exceed original estimate constituted a breach); *Ragonese v. United States,* 120 F. Supp. 768, 771 (Ct. Cl. 1954) (withholding of information on quantity of water constituted a breach). In breaching that affirmative duty, respondent's actions gave rise to a claim for total breach, which would encompass anticipatory profits. *Carchia v. United States,* 485 F.2d 622, 625 (Ct. Cl. 1973);

RESTATEMENT (SECOND) OF CONTRACTS, § 243 cmt. a. (1981) ("No precise general rule can be stated for determining in all cases when a breach gives rise to a claim for damages for total breach . . . however [the most significant type is where] the breach occurs before the injured party has fully performed . . . .")

Respondent concedes that it breached its duty to use reasonable care in preparing the estimates, but argues this "was not a breach of a contractual promise, and is not compensated by award of anticipatory profits." We disagree. Perhaps some possibility existed that respondent could have fully performed or otherwise cured the breach caused by the negligent estimates, but it did not. Instead, it issued the 29 August 1994 letter (finding 16) which repudiated any contractual obligation created by the estimates and thereby impaired the face value of the contract by 90 percent. Whether viewed as a repudiation following a breach, RESTATEMENT, § 243 (2), or a repudiation not associated with a separate breach, *id.*, § 250, the breach is total. In either case, appellant is entitled to be made whole, and here that includes anticipatory profits to the extent they can be proved.

We have considered respondent's arguments and affirm our original decision.